Supreme Court, U.S.
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CASE NO. 93-2071

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX 1

MANDATE

FROM
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

STYLE: CH2M Hill Southeast, Inc. v. Pinellas County

COUNTY: Pinellas

APPELLATE CASE NO: 90-02027, 90-02028, 90-03562, 90-03563

TRIAL COURT CASE NO: 83-13313-8

This cause having been brought to this Court by appeal and after due consideration, the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that further proceedings be had in said cause in accordance with the opinion of this Court and with the rules of procedure and laws of the State of Florida.

WITNESS, the Honorable Jack R. Schoonover, Chief Judge of the District Court of Appeal of the State of Florida, Second District, and the seal of the said Court at Lakeland, Florida on this day.

June 8, 1992

/S/
WILLIAM A. HADDAD
CLERK, DISTRICT COURT OF
APPEAL OF FLORIDA, SECOND
DISTRICT

APPENDIX 2

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Case Nos. 90-02027 and 90-02028

MADISON MANAGEMENT GROUP, INC.
and CH2M HILL SOUTHEAST, INC.,

Appellants,

v.

PINELLAS COUNTY, FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT
CH2M HILL SOUTHEAST, INC.

On Appeal from a Final Judgment
entered in the Sixth Judicial Circuit
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Introduction

This appeal comes from a final judgment awarding Pinellas County $19.8 million against CH2M Hill Southeast, Inc. ("Hill"), design engineers on the County's 1975 purchase and installation of a 13.5 mile pipeline to carry drinking water from Pasco County wellfields to Pinellas County. The award represents the cost of constructing and installing a completely new and upgraded 13.5 miles of pipeline, to replace the pipeline which has been used for the past 12 years and is still being used.

The trial lasted from January 1989 to January 1990. The trial transcript contains 14,000 pages, the record comprises 265 volumes, and the index to the record on appeal is itself 437 pages long. The lower court's final judgment, which was prepared by counsel for the County, is 200 pages long, contains 1,164 footnotes, and took plaintiff's counsel over 1000 hours to draft. (V. 124 at 18442).

Practical necessity limits the points on appeal to the most compelling legal errors, starting with the lack of a fair and impartial trial. Actions taken and comments made by the trial judge during the course of trial created a reasonable belief among Hill's principals that the trial judge was biased in favor of the County. As a matter of law, the trial judge was required to disqualify himself when Hill presented timely and legally sufficient motions for disqualification. Even under the conditions Hill was required to endure during trial, however, the County failed to establish Hill's liability on any basis for a $19.8 million award.

Throughout this brief, the trial transcript will be referenced "(V.)."

Statement of the Case

Pinellas County sued Hill, with whose predecessor (Black, Crow & Eidsness, Inc.) it had contracted for the design of 13.5 miles of pipeline, for alleged negligence and breach of contract. (V. 8 at 972-80). The suit included an action against the manufacturer of the pipe, Interpace, Inc. (now known as Madison Management Group, Inc.), for negligence, breach of contract, breach of warranty, strict liability and fraud. *Id.* at 960-72. The case was tried without a jury to Judge Fred Bryson.

On the morning of October 10, 1989, during the course of trial, Hill filed a verified motion seeking to disqualify Judge Bryson from proceeding further in the case. (V. 19 at 2628-3042). Immediately following presentation of the motion, Judge Bryson adjourned court for the day. When court reconvened the next morning, Judge Bryson gave Hill's counsel an opportunity to withdraw the motion, made some comments of his own about the motion, and then adjourned until the County was prepared to argue against the motion. (V. 102 at 15194-205). On October 16, Judge Bryson heard three hours of argument by the County, received affidavits from the County in opposition to the motion, and accepted memoranda of law from the parties. On October 17, he denied tho motion. (V. 24 at 3281-84).

On October 24, Hill filed a petition for writ of prohibition in this court, which was denied on October 27 without requiring a response. A second motion to disqualify Judge Bryson was filed on November 3 and orally denied on November 6. (V. 104 at 15488). Hill again filed a petition for writ of prohibition with this court on November 16, and the court again denied the petition without requiring a response.

Following the close of evidence in January 1990, the trial judge directed all parties to submit proposed findings of fact and conclusions of law. (V. 123 at 18430-431). The parties complied, with the County's counsel submitting a 200 page proposed final judgment, containing 1,164 footnotes. (R. at 3966-4244). Closing arguments were held on June 2, and four days later Judge Bryson signed the County's proposed final judgment without changing a word, a comma or a footnote. *Id.*

Hill filed a timely notice of appeal. After extensions of time to file briefs as a result of circuit court clerical difficulties preparing the record on appeal, the parties eventually agreed to the submission of briefs on prescribed dates without citations to the record, and a later substitution of briefs containing record citations within 15 days after the record index was served. The court has authorized briefs of up to 75 pages.

Statement of the Facts

On March 24, 1975, Hill entered into a contract with Pinellas County to perform specified engineering

services in connection with the design of a water distribution pipeline for the County (the "Hill Contract"). The Hill Contract obligated Hill to design a pipeline that would operate at 100 psi (pounds per square inch), as set forth in the County's Ten Year Master Plan. (V. 128 at 19042 p. 2). That Master Plan established basic assumptions and design criteria for all future pipeline pressures, setting distribution operating pressures at "an absolute maximum of 100 psi" and main pipe transmission line pressures at never more than 100 psi.[1/] (V. 224 at 27214 p. 5-4).

The 13.5 mile pipeline was to consist of 3,400 pipe segments, each of which is approximately 20 feet in length. The pipe segments were made with a concrete inner core, steel cylinder, concrete outer core wrapped with high strength wire, and covered with slurry and mortar coatings. The pipeline was routed predominantly through pasturelands, farms, and utility rights of way. (V. 245 at 27758).

The Hill Contract divided engineering responsibilities into four categories, labelled as follows:

1/ In designing a *Pipeline* for 100 psi operating pressures, Hill specified an additional 50 psi pressure capacity for the manufacture of pipe segments as a safety margin, and then added a 60 psi surge capacity. The County's contract with the supplier specified that pipe segments were to have a 150 psi capacity. (*See* V. 219 at 26961-27144 pp. 126-32; V. 220 at 23153; in contrast to V. 128 at 19043 pp. 15069-1 [REV], 19041 p. 10 §3.2.3).

Item A - Design of Improvements
Item B - Professional Services During Construction
Item C - Resident Project Representation
Item D - Supplementary Services

The Hill Contract expressly required the County to authorize services in writing before Hill became responsible to perform services in any of the four categories. (V. 128 at 10942 pp. 3-5).

Hill received authorization from the County to perform design services under Item A on March 26, 1975. (V. 240 at 27671). Item A responsibilities contemplated design of the pipeline, concluding with engineering recommendations in regard to the award of the construction contracts. Hill's services under Item A were completed on January 5, 1977. (V. 243 at 27732).

Hill's specifications for the pipeline segments required the manufacturer of pipe segments to comply with standards promulgated by the American Water Works Association ("AWWA"), and more specifically for reinforced concrete pressure pipe with steel cylinder prestressed "in accordance with AWWA's C301." (V. 128 at 19043 p. 15060-1 [REV]; V. 244 at 27666). The specifications also required that the owner of the pipe segments (which had become the County itself) receive assurances from the supplier that the pipe segments were manufactured in accordance with AWWA standards. (V. 128 at 19043 pp. 15060-1 [REV], 15060-2 [REV], 1010-3).

Specifications for the manufacture of pipe segments provided that the County and/or its engineer

could inspect the pipe manufacturing process. (V. 128 at 19043 p. G-2 - G-3 [REV]). The Hill Contract, however, required County authorization (which was never given) before Hill could provide inspection services at the manufacturing site. (V. 128 at 19042 p. 4).

The 1975 Hill Contract had contemplated as an Item A service that Hill would draft a "traditional" construction contract for a general contractor with whom the County would contract to install the pipeline, and who In turn would be responsible to purchase the pipe directly from the pipe manufacturer. (V. 76 at 11177). In order to take advantage of its governmental exemption to avoid the payment of sales tax on the purchase of pipe segments, however, the County in September 1976 elected to hire a general contractor only for installation of the pipeline, and to contrast directly with a pipe manufacturer to purchase pipe segments. (V. 128 at 19042). The County's decision to have a separate pipe purchase contract was made approximately a year and a half after execution of the Hill Contract -- after Hill had performed virtually all of its Item A design services. (V. 76 at 11179).

Interpace was recommended as the low bidder for the manufacture of pipe segments for the project on January 5, 1977. (V. 97 at 14401-402; V. 243 at 27732). The County awarded a contract for the manufacture of pipe segments to Interpace (the "Interpace Contract") based on its lowest responsive bid, its widely-recognized reputation as one of two primary pipe manufacturers on the east coast of the United States during the 1970's, the utilization of Interpace's prestressed concrete pipe in hundreds of cities throughout the country, and the

County's own use of Interpace's prestressed concrete pipe in over 40 miles of the Pinellas County water system. (V. 44 at 6643-44; V. 66 at 9858; V. 67 at 9943; V. 128 at 19043 p. B-3 [REV] 1005).

Hill was not a signatory or party to tho Interpace Contract. The County was identified in the contract as "resident engineer," and Hill was named as "engineer." (V. 8 at 1018-23).

Pursuant to the terms of its contract with Hill, the County authorized Hill to perform Item B, installation-phase services in connection with the Pinellas County water system in early 1977. (V. 240 at 27666). Hill's Item B services contemplated an average of four visits to the installation site each month, but also expressly stated that its visits did not guarantee the contractor's performance. (V. 128 at 19042 p. 4). The last, unnumbered paragraph in Item B provided that Hill's professional service did *not* include "the testing of materials or the furnishing of resident project representatives, field engineers and inspection personnel." Hill fulfilled all of its obligations under Item B of the contract and a limited number of specially-requested Item D services, and the County accepted the project as substantially complete as of October 2, 1978. (V. 245 at 1172, 1173).

> No work was ever authorized by the County for Item C, "resident engineer" services. Those services were "to observe the construction work of the contractor on a daily basis [including] field observation, inspection of materials and work, preparation of details for the prosecution

of the work, and other detailed inspection and complex reportage requirements. (V. 128 at 19042 p. 5). The County elected to utilize its own engineering staff to accomplish these responsibilities, including daily inspection of the installation and construction of the pipeline. (V. 96 at 14225, 14231, 14235-236, 14256). Pipe segments were inspected and accepted on site by Bumbey & Stimpson, the County's installation contractor. (V. 98 at 14617-619).

The Interpace Contract, to which Hill was not a party, defined Interpace as the "supplier." It required Interpace to furnish evidence that the materials and finished articles met appropriate manufacturing standards prior to their delivery to the pipeline site. (V. 8 at 995, SC-03(B)). Interpace in fact submitted shop drawings which specified that pipe segments would be manufactured "in accordance with AWWA specifications C-301-72." (V. 128 at 19045). Those specifications allowed the minimal tensile strength for wire in the pipe segments to exceed class II wire if the wire met the other requirements for class II wire. (V. 128 at 19041 C-301-72, para. 2.8.1). Interpace selected and used class IV wire in its pipe segments. County experts testified that class IV wire used en this project passed all test requirements specifically identified under AWWA standards. (V. 38 at 5716; V. 44 at 6709-10; V. 60 at 8823-24, 8874; V. 61 at 8807-11; V. 121 at 18137-139).

Prior to executing its contract with Interpace, the County obtained tests on pipe segment samples taken

from Interpace's Lacoochee pipe manufacturing plant. (V. 84 at 12411-415; V. 96 at 14257-258). Later, acting under authorization in its contract with Interpace, the County repeatedly inspected the pipe segment manufacturing plant.[2/] (V. 96 at 14229-231, 14245-246). As a result of a tip from a pipe manufacturing competitor and its own visits to Interpace's facility, the County suspected that aggregate used to manufacture the cores and concrete coating of pipe segments was inadequate. (V. 96 at 14256-259).

The pipeline had been in operation for nearly 12 years at the time of trial. Throughout that time the water pressure in the pipeline was normally below 100 psi. (V. 62 at 9114; V. 84 at 12463-471; V. 95 at 14052). On November 13, 1979, one segment of prestressed concrete pipe broke in the pipeline during a lightning storm which interrupted power to pumps and caused a surge in pressure that was unchecked because a county operator had disengaged a bypass valve. (V. 98 at 14580-586, 14645-655; V. 131 at 19385 p. 44). This was the only in-service rupture of the pipeline up to and through the conclusion of trial in January 1990.

On December 20, 1980, a pressure test was conducted by the County which resulted in a rupture of one segment of prestressed concrete pipe. Following the test, the County excavated 10 pipe segments north of the break, submitted all of these pipe segments to its experts, and found no indication of any comparable pressure defect. (V. 71 at 10554-557; V. 220 at 2750,

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2/ A Hill representative on approximately three occasions also observed the manufacturing process for this pipeline at Interpace. (V. 97 at 14358).

2715). County experts subsequently inspected an additional 800 segments of pipe, comprising nearly three miles of pipeline. These pipe segments were found to be acceptable. They were left in the pipeline and continued to function through the trial. (V. 42 at 6405-12; V. 71 at 10557-558).

After the pipe segment's failure under the County's pressure test in December 1980, the County instituted a monitoring and repair program for the pipeline. The program began with a 1981 "over-the-line" survey to locate potentially corroded pipe segments in the pipeline. (V. 70 at 10404-405; V. 221 at 27161). Using this screening method, the County excavated 10 suspect pipe segments and examined them for defects. (V. 221 at 27161). Each segment was found to be in good condition, left in the pipeline, and continued to function through the trial. (V. 43 at 6488-500).

The County conducted another pressure test of the entire pipeline in 1982, subjecting it to a sustained pressure of 150 psi. The pipeline passed the pressure test without incident. (V. 43 at 6489-92; V. 82 at 7977-79; V. 221 at 27162).

In 1983, the County conducted a number of over-the-line surveys and excavations, resulting in the selection of 70 pipe segments to be examined for defects. Those pipe segments selected for testing were from areas screened to show the highest potential for corrosion. (V. 43 at 6509-14). Of these 70 segments, 19 were removed for repair. The other 51 were left in the pipeline and continued to operate through the trial.

(V. 43 at 6511-42; V. 72 at 10685-689; V. 133 at 19388; V. 155 at 20320; V. 224 at 27164).

In 1984, the County conducted another over-the-line survey and repair program which identified 10 more pipe segments for testing. Each of these were removed from the pipeline for testing, and replaced. (V. 43 at 6513-16; V. 72 at 10565-717; V. 133 at 19388).

In 1985, the County conducted another 150 psi pressure test on approximately three quarters of the pipeline. The pipeline passed this test without incident. (V. 43 at 6515-20; V. 221 at 27168).

On June 1, 1989, during the trial, the County repaired a leaking manhole in the pipeline. The leak had been caused by blow holes manufactured in the rim of the manhole. (V. 211 at 26903). County inspectors had detected this manufacturing defect during the installation process and documented it five times. The County failed to correct the problem before accepting the pipeline, however. (V. 259 at 29471, 29472). The County knew about the leak itself as early as October 19, 1977, but never notified Hill. *Id.*

The pipeline originally cost the County approximately $6.5 million. For its professional engineering services, Hill was paid a fee equal to 5.62% of the project cost, or $364,939.27 (5.628 × $6,493,581.32). Judge Bryson's final judgment awards the County $19.8 million against both Hill and Interpace, of which $17.8 million represents the cost of replacing the entire 13.5 mile pipeline with a new line having components materially different from those originally contracted for. Judge Bryson declined to

clarify whether the award is joint and several, although he stated on motion to amend the judgment that the County was entitled to only one satisfaction. (V. 126 at 18860).

Summary of Argument

The trial judge was required to disqualify himself following the presentation of timely motions to disqualify made during the course of trial. The judge had engaged in actions during the trial, and made comments throughout the trial, which prejudiced Hill in the presentation of its case and created a reasonable fear in Hill's principals that the judge was biased in favor of the County. The motions for disqualification which were presented by Hill were legally sufficient on their face. Moreover, the trial judge made comments and took actions following presentation of the motions which mandated his disqualification. *E.g.*, *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla. 1990).

The trial judge erred as a matter of law imposing tort liability on Hill. The County neither alleged nor proved any tort independent of Hill's contractual duties; indeed, the County affirmatively identified Hill's alleged negligence by reference to its contractual obligations. In the absence of a tort independent of contractual duties, no tort recovery is permitted. *Lewis v. Guthartz*, 428 So.2d 222 (Fla. 1982). Nor is tort liability possible for a breach of statutes creating no private right of action and imposing obligations only on governmental agencies. In any event, tort liability against Hill cannot be sustained where, as here, there is only economic loss to the

pipeline itself, with nominal (if any) damage to other property. *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987); *AFM Corp. v. Southern Bell Telephone and Telegraph Co.*, 515 So.2d 180 (Fla. 1987).

The trial court erred as a matter of law in finding Hill liable for breach of its engineering contract based on defects in the pipe segments manufactured by Interpace and as a result of Interpace's use of class IV wire in pipe segments. Hill had no contractual obligation to inspect the manufacture of pipe segments being made by Interpace. Nor was the use of class IV wire by Interpace a breach of Hill's contract, since that type of wire was in conformity with AWWA C-301-72 standards that Hill had specified. The trial court's determination that the County's contract with Interpace merged with the Hill Contract so as to impose additional contractual duties on Hill is legally unsustainable.

The trial court's award of damages equivalent to the cost of replacing the entire 13.5 mile pipeline with improved components is not sustainable by law or by the evidence. Hill has no tort liability whatsoever, and its obligation for breach of contract, if any indeed occurred, at most would warrant liability for the costs of repair. The entire pipeline had been operating as intended for twelve years at the time of trial, with only one in-service break. No competent substantial evidence was presented to sustain the trial court's conclusion that the entire pipeline must be dug up and replaced. Moreover, no theory of law authorized the trial judge to award damages for a new pipeline with

improvements and betterments that had not been contracted for originally.

Argument

I. The trial judge was required as a matter of law to disqualify himself.

Any request to disqualify a trial judge is a serious endeavor, and any attempt to do so in the midst of a complex and protracted trial has even more grave implications for the justice system. After 10 months of trial, the first 8 of which were taken up by the presentation of the County's case, Hill came to the reluctant conclusion that it was not receiving a fair trial from Judge Bryson.[3/]

Before filing a motion for disqualification, Hill submitted the trial transcript to outside counsel unaffiliated with the case for an evaluation of impartiality. (V. 102 at 15313-318). After that attorney confirmed that Hill's fear of prejudice in favor of the County was well-founded, Hill prepared and presented its first motion for disqualification. *Id.* What occurred on presentation of the motion for disqualification, and

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3/ In support of this point on appeal, Hill has created an appendix to this brief which contains representative samples of the trial judge's prejudice. This Appendix of Prejudice (cited as "App. Prej.") will provide the court with a sample of what the record bespeaks about the reasonableness of Hill's concern.

its disposition, only exacerbated Hill's worst fears of prejudice.[4/]

The legal bases for disqualification are identified in Section A below. The first issue is whether Hill's motion for disqualification, on its face, was legally sufficient and timely so as to require the judge to step aside. An application of the facts in this case to the legal tests for disqualification, demonstrating that the motion was legally sufficient, is presented in section B below. A second issue is whether, even if the motion was not legally sufficient, Judge Bryson engaged in conduct in response to the motion which required his recusal. He did, and this point is discussed in section C below.

A. The legal bases for disqualification

In *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla. 1990), the Supreme Court reiterated the time-honored requirement that facts in a motion seeking to disqualify a judge need only show a well-grounded fear that the movant will not receive fair and impartial treatment from the judge. If the motion does this, it is legally sufficient on its face and the judge has no discretion -- he must step aside.

The standard of legal sufficiency is simple and straightforward.

4/ Hill filed a second motion to disqualify based on the totality of trial events through denial of the first motion, including Judge Bryson's post-motion actions and comments. (V. 25 at 3323-503).

> In order to decide whether the motion is legally sufficient, '[a] determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.' [*Livingston*] at 1087. The legal sufficiency of the motion is purely a question of law.

MacKenzie, 565 So.2d at 1334-35, *quoting*, *Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983); *see also* Rule 1.432, Fla. R. Civ. P. Three applications of this standard are pertinent here. First, the judge has no authority to pass on the truth of the allegations in the motion. In assessing legal sufficiency, the alleged facts must be taken as true.[5/] *Bundy v. Rudd*, 366 So.2d 440 (Fla. 1978); *Townsend v. State*, 564 So.2d 594 (Fla. 2d DCA 1990); *Brewton v. Kellt*, 166 So.2d 834 (Fla. 2d DCA 1964). In fact, any attempt to refute the allegations of a motion to disqualify is disqualifying conduct in and of itself. *MacKenzie*, 565 So.2d st 1339; *Gulfstream Park Racing Ass'n, Inc. v. Gale*, 540 So.2d 196 (Fla. 3d DCA 1989); *Stimpson Computing Scale Co. v. Knuck*, 508 So.2d 482 (Fla. 3d DCA 1987); *A.T.S. Melbourne, Inc. v. Jackson*, 473 So.2d 280 (Fla. 5th DCA 1985). The judge must "forego the pleasures of oral condemnation." *Hayslip v. Douglas*, 400 So.2d 553, 558 (Fla. 4th DCA 1981) (Letts, J. concurring).

Second, the standard focuses not on the judge's perceptions or those of opposing counsel, but on the perception of a "reasonably prudent person" in the

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5/ Rule 1.432 provides that a judge "shall determine *only* the legal sufficiency of the motion." (Emphasis added).

shoes of the litigant. *MacKenzie*, 565 So.2d at 1342 (Overton, J., concurring) (the question "is whether an ordinary litigant would reasonably question the judge's impartiality").

Third, disqualifying prejudice of a judge includes prejudice against counsel as well as a party. *Livingston*, 441 So.2d at 1083; *Hayslip*, 400 So.2d at 553. Just last year, this court applied this aspect of disqualification in a counsel prejudice situation remarkably similar to the facts here.[6/] *Townsend*, 564 So.2d at 594. A judge's tirade against counsel in open court, of course, itself presents a legally sufficient basis for a reasonable belief that the judge cannot be impartial toward the litigant. *McDermott v. Grossman*, 429 So.2d 393 (Fla. 3d DCA 1983).

Judge Bryson violated every tenet of Florida law on disqualification. (1) He himself Passed on the truth of allegations contained in Hill's motion. (2) HQ allowed testimony from opposing counsel in contravention of those factual allegations, including a shouting tirade by counsel for the County challenging the ethics, honesty, good faith and veracity of Hill and

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6/ In *Townsend* the judge had declared: "I may be prejudiced against counsel but not against your client." 564 So.2d at 595. Judge Bryson declared in his written order denying disqualification: "The statute for disqualification . . . pertains to prejudice or bias for or against the parties in the litigation and not their lawyers. . . . [T]he Court . . . does not believe that he has been, is, or will be prejudiced for or against any of them. He . . . assures all of the parties that they will receive a fair and impartial trial *despite any feelings which he might have had toward [Hill's counsel] personally.*" (V. 24 at 3281-84) (emphasis added).

its counsel. (3) He tested the motion against his own perception of fairness, rather than analyzing the perception of a reasonably prudent lay person in Hill's position. (4) He acknowledged his prejudice against Hill's counsel in the belief that only prejudice to the party itself is relevant to disqualification.

B. The motion was legally sufficient on its face and timely.

The allegations of the motion of Judge Bryson's disqualification, supported both by appropriate affidavit of Hill's principal and by good faith certificates of counsel, presented facts which were legally sufficient to require disqualification. The allegations dealt with comments and conduct during trial which generated in Hill personnel an eminently reasonable fear of bias against the company and its attorneys.

1. Demonstrated bias in favor of the County's Position.

The first incident of tilt toward the County occurred at the outset of the trial, in opening statements. Counsel for the County was given free rein in opening statement over one and a half days to comment extensively on the County's interpretation of the contracts which governed the proceedings. When Hill's counsel attempted to assert Hill's position on the same contractual provisions (in less than a half day of opening statement), Judge Bryson interrupted him four times to point out that he had already heard about the

contracts. (App. Prej. 1, pp. 391, 415, 426, 457). The pattern was set.

In derogation of Hill's defense that its contractual responsibilities as engineer did not include testing and inspection of materials at the pipe manufacturing plant -- the very heart of the County's case -- Judge Bryson made clear that he had accepted the County's position and predetermined Hill's liability *before* any defense evidence on the issue was presented. Addressing a former Hill employee, he stated:

> THE COURT: [To Witness Henderson, former Hill employee] I appreciate how convenient it would be for you to be able to have every design engineer, every person that put pencil to parer, or put a word processor to work on any piece of paper that came out of [Hill], live in a vacuum tube, never having inhaled the odor of concrete, never having touched a piece of slag or aggregate or sand, or watched a piece of pipe being wired or anything else.
>
> But sir, I'm afraid I can't let you live that way.

(App. Prej. 2, p. 78).

Other instances of preconceptions against Hill abound in the record. (App. Prej. 3, pp. 135-44, 151-65; App. Prej. 4, pp. 1858-59; App. Prej. 5, 51-52). Worse, Judge Bryson prejudged Hill's liability based on his own views regarding pipelines and their construction,

notwithstanding that no defense evidence had been introduced on that subject. (App. Prej. 3, p. 162; App. Prej. 6, pp. 650-54).

A lack of even-handedness and Judge Bryson's overt bias are clearly seen in his treatment of evidence regarding the contracts and their interpretation, which were the crux of the lawsuit. The County presented volumes of evidence regarding the contracts and their meaning. Hill objected to interpretive analyses contrary to their plain reading. Judge Bryson overruled these objections, but gave assurance that Hill too would be allowed to develop testimony on contract interpretation. (App. Prej. 7, pp. 941-42; App. Prej. 8, pp. 1136-37). That proved not to be the case. Judge Bryson reneged on his promise and, without objection from County counsel, barred Hill's attempt to introduce contract interpretation testimony contrary to that presented by the County. (App. Prej. 3, pp. 135-36, 140-43). By accepting only the County's analysis, Judge Bryson fostered a recurring theme of applying a dual standard to the admission of evidence, laying the groundwork for his later distortion of those contracts and eviscerating Hill's opportunity to present its case.

2. Limitations placed on Hill's examination of witnesses.

During the 66 days during which the County presented its evidence over a leisurely period of eight months, Judge Bryson never curtailed the County's examination of witnesses or made critical comments of its counsel. The exact opposite was true when Hill had its turn at bat. Judge Bryson interrupted the

examination of Hill's very first witness with a directive that counsel limit the testimony to be elicited.[7/] (App. Prej. 9, pp. 70-81). Hill's next witness, its chief expert witness on engineering standards applicable to this type of pipeline project, sought to testify on the same subject as the County's chief expert witness had testified on

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7/ THE COURT: Why don't you ask him if he felt that they met the standard of care in the design of a project and engineering function, and quit?

* * * * *

MR. BULL: We sat there for seven months, your Honor, and this is our first day, our first morning --

THE COURT: Mr. Bull, we've been through everything that you've talked about, thus far, with this witness, before.

MR. BULL: Well, I think my next question might clear up some of --

THE COURT: Why don't you ask him the one question --

MR. BULL: -- John's objection

THE COURT: -- What he thinks about his opinions, as to the standard of care, as to whether it met the contract, sit down, and let those people cross examine him.

three separate occasions over a period of six weeks.[8/] Hill's expert was met with these chilling instructions:

> THE COURT: Now, why don't you get him a copy of the plans that your client

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[8/] The court cannot fully appreciate the trial court's bias without having some insight into the dominant expert testimony which forms the basis for the County-drafted, unprecedented final judgment. That judgment accepts the testimony of Mr. Robert Edmunds, a former Hill employee who was called as an expert by the County, on virtually all of the findings of negligence and contract breach in connection with the pipeline. Mr. Edmunds' qualifications as an expert were not as broad as his opinions, however.

Mr. Edmunds is a University of Florida graduate, with a masters degree in civil engineering. Before leaving Hill, he had been a design project manager at Hill. Nonetheless, and despite this seeming level of skill, in the course of some six weeks on the witness stand Mr. Edmunds gave so-called expert opinions on engineering, mathematics, contract interpretation, quality control and testing of prestressed wire and prestressed concrete pipe, metallurgy, statistics, population studies and forecasts, hydraulics, cost estimating, standards for pipe, pipelines and wire, engineers' standards of care, and hydrology -- to name a few. There was no subject area that he did not deem himself an expert. ("Q. Well, let me try to make it simple. Is there any aspect of this case, engineering aspect, that you don't think that you have expertise in? A. I can't think of an engineering aspect of this case that I don't have expertise in"). (V. 33 at 4878). A more circumspect and neutral judge would have found his testimony in several of these areas to be beyond Edmunds' realm of expertise, or at least not singularly controlling against Hill in light of the very credible, contradictory testimony of experts (some of whom were other *County* experts) who were well-qualified in the fields as to which they opined.

designed in system, have him look at them, ask him if they met the standard of care, sit back, admire your work? Because these guys are going to paw on him for the next half day. Now, I don't want to have to hear it twice.

* * * * *

THE COURT: Why don't you hand him a copy of the plans and say, 'Have you examined the plans?' And if he says 'no,' everybody in the place is going to fall off of his chair. And say, 'Do the plans meet the standard of care, or did they meet the standard of care at the appropriate time?' And then let's get on with it.

Because Mr. Allen or Mr. Seane, or both of them, or Mr. O'Brien, or whoever, I'm sure, are going to have a lot of questions in that area.

So let's take a ten minute recess. And possibly you can concentrate that strategy and, perhaps, save a day of this man's time, as well as mine.

(App. Prej. 10, pp. 44-46).

During later examination of this same witness on the third day of testimony, Judge Bryson angrily interrupted Hill's examination by again advising that counsel for Hill should frame questions in the manner

he (Judge Bryson) recommended and then "sit down." (App. Prej. 3, pp. 137-39).

The pattern continued. Hill's fourth witness, an engineer, was testifying on the standard of care. The County had been accorded unlimited time and freedom in presenting testimony on this issue. Judge Bryson pointedly suggested that Hill "can, with about three questions dispatch [the witness] from direct examination." He even proposed the questions to be asked, who looked at the plans, he reviewed Mr. Henderson's work, and he found that it met the standard of care." (App. Prej. 11, pp. 41-42).

Hill's fifth witness fared no better. He was cut off at the beginning of his direct testimony by an angry Judge Bryson shouting

> THE COURT: . . . You're not going to win or lose this case by a greater number of witnesses or a lesser number of witnesses. Now, why don't we get to the bare bones examination of this guy, which will take about ten questions, and let's get him to cross examination, and get him off the stand, and move to something else. (App. Pres. 12, pp. 7-10). The County, of course, had presented an unlimited number of witnesses. *See* Hill's initial brief in Case Nos. 90-3562 and 90-3563, appealing the cost judgment in this case.

3. Hostility toward and embarrassment of Hill witnesses.

Judge Bryson was not only an obstacle to the presentation of Hill's case he affirmatively demonstrated his hostility toward Hill's witnesses. For example, after listening to Hill's primary expert witness, Judge Bryson put this completely intemperate question in his examination:

> THE COURT: Sir, could I ask you one question? I don't mean to be insulting --
>
> THE WITNESS: Yes, sir.
>
> THE COURT: -- But I think it's something that's dictated as a product of the testimony of the last two days.
>
> Do you believe in Santa Claus?

(App. Prej. 3, pp. 225-32). It takes no imagination to assess the effect of this kind of remark on Hill's principals, its counsel or its other witnesses. *See* the affidavit of witness Browning which accompanied the motion for disqualification. (App. Prej. 13). As another example, Judge Bryson interrupted the examination of Hill's design engineer to state the witness didn't know what he was talking about, and to suggest that he should not be in the design engineering business. (App. Prej. 14, pp. 197-98; *and see* App. Prej. 3, pp. 225-32).

Not content with merely intimidating Hill's witnesses, Judge Bryson himself examined them in a

way which was overtly hostile and prejudicial to Hill's defense. (App. Prej. 2, pp. 78-79; App. Prej. 3, p. 268; App. Prej. 9, pp. 78-81, 123-50; App. Prej. 15, pp. 530-41, 549-54).

4. **Curtailed cross examination.**

One of the most essential rights accorded defendants in a civil proceeding is cross-examination. Judge Bryson, however, took it upon himself in this case to restrict, interrupt and curtail Hill's cross-examination of County witnesses, all without objection by counsel for the County. Specific examples were detailed in the motion to disqualify. A few examples are repeated here.

Judge Bryson cut off the impeachment of Pinellas County chief expert witness, Robert Edmunds, when, on Hill's cross-examination, Mr. Edmunds admitted to improperly signing and sealing certain design engineering documents on a related pipeline project, in violation of the very professional engineering ethics and statutory requirements which Judge Bryson later applied against Hill in his final judgment. (App. Prej. 16, pp. 1779-81). He interrupted and terminated a line of questioning on Hill's cross-examination of an expert for the County during questions as to the witnesses' credibility and qualifications to prepare a report regarding the pipe. (App. Prej. 17, pp. 278-79). He cut off Hill's cross-examination of another County expert as to a report placed into evidence during his direct examination, by instructing Hill's attorney to call him back as your own witness. . . . (App. Prej. 18, pp. 185-86). He chastised Hill's attorney for

cross-examination of a County witness regarding the City of Detroit's approval of class IV wire in prestressed concrete pipe. (App. Prej. 19, pp. 261-65). He terminated Hill's questioning of another County expert which showed his testimony to conflict directly with that of another County witness. (App. Prej. 20, pp. 472-73). He terminated Hill's cross-examination of the County's chief engineer regarding important admissions about his understanding of Hill's contractual duties on the original project, repeatedly initiating objections and disrupting Hill's presentation. (App. Prej. 21, pp. 80-85, 92-97). He interrupted Hill's cross-examination of yet another County expert by curtailing examination on matters which had been placed in issue by the County in its direct case. (App. Prej. 22, pp. 52-53). He interrupted Hill's impeachment and cross-examination of the County's chief expert to argue in support of the County and to protect the witness. (App. Prej. 23, pp. 43-44).

County counsel and Judge Bryson attempt to explain away and justify these multiple disruptions of the defense case as normal judicial involvement in a bench trial. They may view them that way (incredibly), but as a matter of law they must be viewed from the perspective of Hill personnel sitting in the courtroom, asking themselves whether they were getting cold neutrality and a fair trial from the presiding (and deciding) judge. Because these ordinary litigants did not reasonably believe from this cumulative behavior that they were getting a fair trial, it matters not whether the judge himself or opposing counsel can now put a plausible "spin" on this courtroom behavior.

The motion to disqualify was legally sufficient. It was also timely. The motion asserts a series of actions and comments by Judge Bryson which occurred over several months. As these hostile comments and actions poured forth from the bench, they impacted the presentation of Hill's defense to an extent that gave rise to a gnawing concern by corporate principals that a pattern was unfolding. That concern became a legitimate and well-founded fear going into the eighth and ninth months of the case, when Hill and its counsel were repeatedly rebuffed in their presentation of the defense case.

Hill had been circumspect in not acting earlier on comments and actions which suggested Judge Bryson's bias in favor of the County and hostility to Hill's attorneys, but the time for circumspection finally passed. Hill's concerns about bias finally heightened into the realty that Judge Bryson was indeed hostile and prejudiced against Hill and its counsel. Under these circumstances, the motion was both timely and in good faith.[2/] *See Lamendola v. Grossman*, 439 So.2d 960, 961 (Fla. 3d DCA 1983) (motion was filed without inordinate delay "under the circumstances of this case"); *Lake v. Edwards*, 501 So.2d 759 (Fla. 5th DCA 1987) (motion was timely although filed when all that remained of the trial was the court's ruling on a motion for new trial).

2/ That the motion was filed in good faith is evident both from the restraint exhibited by Hill in not filing the motion earlier, and by Hill's submission of the trial transcript to non-trial counsel for a pre-filing, independent evaluation.

C. Disqualifying conduct in addition to legal sufficiency of the motion.

Even were the court to hold that the motion was not legally sufficient such as to require disqualification upon its presentation, the post-filing conduct and comments of Judge Bryson unquestionably compelled his disqualification.

When Hill presented its motion to disqualify, Judge Bryson's immediate response was disagreement with the accuracy of the allegations of the motion[10/] and a challenge to counsel's good faith in presenting it.[11/] Judge Bryson then stated that the motion reminded him of a parable about the good samaritan who gave a hungry beggar a ham, and who was robbed by that beggar the next day using the hambone. (V. 101 at 15193). Hill's representatives viewed that commentary as meaning that Judge Bryson put Hill in the same category as a thief -- devastating characterization of the defendant from a supposedly

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10/ Judge Bryson indicated that he would have to go back and look at the testimony transcript for nine months of trial, which could only mean that he did not intend to accept the allegations of the motions as true for the purpose of his ruling. (V. 101 at 15192). He then declared that some of the matters contained in the motion "are taken totally out of context . . . ."

11/ Immediately following the oral presentation of the motion, Judge Bryson stated to Mr. Schooley, counsel for Hill, that the motion and matters contained in the motion "exceed the duties and boundaries and parameters of advocacy, but go into another area which I would charitably not describe." *Id.*

neutral magistrate. Judge Bryson then concluded proceedings for the day.

The next morning when court convened, Judge Bryson offered Hill's counsel (not Hill itself) the opportunity to withdraw the motion for disqualification.[12/] (V. 102 at 15197). When counsel declined to withdraw the motion, Judge Bryson took issue with the truth of the allegations of the motion, despite a twenty-four hour recess in which he said he had researched the law of disqualification. He then characterized the motion as containing "lies" of the most offensive type, in these words:

> Many years ago, someone told me that there were basically two types of untruths;

12/ Believing that the withdrawal offer was directed at Hill, Hill's counsel declined to withdraw the motion on behalf of the client. Judge Bryson immediately snapped:

> No. I'm talking to you. I'm not talking to Hill. You are the lawyer. They are the client. And I'm affording you ac a lawyer, the opportunity to withdraw the motion.

(V. 102 at 15197). This comment becomes significant when coupled with other remarks made by Judge Bryson regarding counsel for Hill, and the recitations in his later order denying disqualification to the effect that presentation of the motion was contrived, that the opportunity to withdrew was afforded because Judge Bryson did not believe that the motion was filed in good faith, that defense counsel had attempted to "goad" the judge into making intemperate remarks requiring recusal, and that disqualification pertains only to prejudice against-parties and not their lawyers. (V. 24 at 3281-84).

> lies and damn lies. But you, sir, in your motion, have crystallized yet a third one. . . . You, sir, in your motion, have taken liberties with the truth that a common curr [sic] would not take with a streetside fireplug.

(V. 102 at 15198-199).

Judge Bryson then recessed court to give counsel for the County an opportunity to respond to the motion. That response came five days later when counsel for the County was afforded an uninterrupted period of roughly three hours to challenge the good faith of Hill's counsel, to call opposing counsel a liar and unethical, to controvert the facts forming the basis for Hill's good faith belief of prejudice, to conduct a tirade against the defendants and their counsel, and to attempt to explain away the disqualifying comments made by Judge Bryson after presentation of the motion.[13/] (V. 102 at 15210-214, 15218-224, 15229-233, 15236-237, 15239, 15243, 15261-262, 15264-266, 15269, 15293-294). The following day, Judge Bryson issued his order denying disqualification, embracing several of the points presented by counsel for the County.

Judge Bryson's course of conduct after receiving the motion to disqualify was in and of itself disqualifying, irrespective of the legal sufficiency of the motion. *Bundy v. Rudd*, 366 So.2d 440 (Fla. 1978);

13/ On four, separately acknowledged occasions during his long, denunciatory speech, counsel for the County noted for the record that he had raised his voice. (V. 102 at 15222, 15224, 15234, 15236).

MacKenzie, 565 So.2d at 1339. His breach of every legal requirement in a disqualification setting is overwhelming.

1. Challenges to the accuracy of the factual allegations, evaluating his own subjective views rather than the perception of the client, and demonstrating hostility toward Hill's counsel.

Judge Bryson's first response to Hill's motion included a declaration that some of the factual matters contained in Hill's motion were "taken totally out of context," and would require him to go back and look at the testimony and transcript of eight or nine months of trial. (V. 101 at 15192). This was followed by the good samaritan parable which expressed his personal feelings of betrayal and dismay toward Hill and its counsel. *Id.* at 15193.

Perhaps personal disappointment and resentment can be explained away during a protracted trial, or even under the circumstances of Hill's presentation of the motion. But nothing can explain or justify Judge Bryson's comment, after twenty-four hours of reflection, that the motion contains not "lies" or "damn lies," but an even more damning form of untruth. Later at the same hearing Judge Bryson made clear that he believed he had the absolute right to challenge the factual foundation for a motion to disqualify if he knew facts to the contrary. (V. 102 at 15203-204). His belief was wrong. The rule in Florida is that facts alleged must be

taken as true, and the sole issue is the legal sufficiency of the motion in light of those facts.[14/]

Judge Bryson is condemned both by his record comments in response to the motion and by his formal order denying disqualification -- the latter adopting justifications and facts from the testimony of County counsel. In that order, he reiterated his view that some quotations in the motion were taken out of context and went on to state:

> *It is the view of the court*, however, that said conduct, as so reflected, does not exhibit any prejudice or bias . . . and, therefore, is legally insufficient toward disqualification.

(V. 24 at 3282) (emphasis added). Judge Bryson clearly applied an erroneous legal standard. The test is not whether Judge Bryson thought his conduct was prejudicial. The test is whether a lay person in the position of Hill reasonably believed that the conduct reflected bias.[15/]

14/ Even counsel for the County agreed with Hill and told Judge Bryson that the facts must be taken as true even if they are known not to be. (V. 102 at 15265-266).

15/ In his order denying disqualification, Judge Bryson reiterated his personal, subjective evaluation of his own attitude by declaring that he has not, had not and will not be prejudiced for or against any of the parties. (V. 24 at 3284). Again, even counsel for the County knew that the proper test for disqualification is not predicated on a trial judge's personal evaluation of his own fairness: [i]t's not for (continued...)

In his order denying disqualification, Judge Bryson made no bones about his pique with Hill's counsel. He reiterated (directly from the diatribe of County counsel) "that counsel for Hill deliberately contrived a means to attack the court's integrity . . . and that said conduct on the part of defense counsel was an attempt to goad the trial judge into making intemperate remarks [as a basis for disqualification]." *Id.* He acknowledged he made "intemperate remarks relevant to the good faith and ethics of [Hill's counsel]" after his twenty-four hour period of reflection following presentation of the motion, and he recounted his personal belief that the parties will receive a fair trial "despite any feelings which [he] might have had toward Mr. Schooley personally." *Id.* at 3284.

Judge Bryson capped his order with the legally unsound view that disqualification pertains only to bias or prejudice against parties, and not their lawyers. *Id.* Contrary to his view, however, both the Supreme Court and this court have said that prejudice or bias against counsel for a party *is* a basis for disqualification. *Livingston*, 441 So.2d at 1083; *Townsend*, 564 So.2d at 594.

15/(...continued)

you to judge whether you subjectively in your mind you [can provide a fair trial], but whether taking the facts as true, do these people have a well-founded belief that they are not going to get a fair trial?" (V. 102 at 15301).

2. Tirade on the record and testimony on the truth of the allegations.

With Judge Bryson's blessing, counsel for the County was permitted to conduct the tirade against Hill's counsel which Judge Bryson himself was barred from delivering. (V. 102 at 15210-313). It makes no legal difference that he used County counsel to accomplish indirectly that which could not be done directly, however. Tirades prompted by the acts of counsel are forbidden (*see McDermott*, 429 So.2d at 393), and the authorization for opposing counsel to testify in opposition to the facts alleged is disqualifying in and of itself.[16/] *Clark Auto Leasing & Rentals, Inc. v. Lupo*, 547 So.2d 1016 (Fla. 4th DCA 1989). The substance of County counsel's wrath was clearly adopted as his own in Judge Bryson's order denying disqualification, including challenges to the truth of the factual allegations in Hill's motion.

For example (although this list is not exhaustive), counsel for the County contested the motion's assertion that the trial was conducted at a leisurely pace over six months by testifying that the pace was in part dictated by Judge Bryson's poor health. (V. 102 at 15233-234; see also *Id.* at 15254). County counsel addressed the out-of-court discussions between Judge Bryson with persons favorable to the County's position in the lawsuit, testifying from personal knowledge that those

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16/ Counsel unabashedly expressed his intent to testify, as opposed to presenting legal argument. He declared more than once that counsel would be "making a record." (V. 102 at 15239-243, 10968). He even insisted that he wanted the judge to make "findings" (of fact). *Id.* at 15256.

conversations had nothing to do with the case. *Id.* at 15236. He testified to his personal view that Judge Bryson was a gentlemen, scholar and an understanding person, based on his personal experience with the judge in a prior matter. *Id.* at 15239. He addressed the allegation of a close personal relationship between himself and Judge Bryson, testifying as to the facts of that relationship. *Id.* He addressed a concern expressed in the disqualification motion regarding Judge Bryson leaving the bench for the testimony of one of Hill's witnesses, by testifying as to the circumstances that surrounded the occasion. *Id.* at 15285.

The Supreme Court's clear directive from *Livingston*, reiterated in *MacKenzie*, is that: "The legal sufficiency of the motion is purely a question of law." *MacKenzie*, 565 So.2d at 1335. A judge is not authorized to challenge or dispute the truth of the allegations in a motion to disqualify. Judge Bryson violated that simple standard and by so doing mandated his disqualification.

II. Hill is not liable to the Counts under any theory of law.[17/]

In its final judgment, the trial court found Hill liable to the County both for negligence and for breach of contract. Neither basis to impose liability is legally tenable. Notwithstanding recitations of fault in the final judgment, Hill breached no common law duty. Nor did Hill breach any contractual obligation to the County.

A. Hill has no tort liability to the County.

For several independent reasons, it was error for the trial court to find that Hill had a non-contractual duty to the County which was breached and caused damage.

1. Hill committed no tort independent of its contractual duties.

In Florida, a breach of contract, no matter how egregious, cannot give rise to a tort. *Lewis v. Guthartz*, 428 So.2d 222 (Fla. 1982). A tort action between

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17/ Without further elaboration here, Hill adopts the argument of Madison Management Group. Inc. With respect to the bar of the statute of limitations against County claims based on the County's *actual* knowledge of the use of class IV wire, the use of mortar coating, the use of Florida aggregates and that Interpace had not sent the County an "Affidavit and Certification of Compliance with AWWA C-301-72."

contracting parties may be brought only when a breach is attended by additional conduct which amounts to a separate, independent and distinct tort. *Id.*; *J. Allen, Inc. v. Humana of Florida, Inc.*, 571 So.2d 565 (Fla. 2d DCA 1990); *Electronic Security Systems Corp. v. Southern Bell Telephone and Telegraph Co.*, 482 So.2d 518 (Fla. 3d DCA 1986); *see AFM Corp. v. Southern Bell TelePhone and Telegraph Co.*, 515 So.2d 180 (Fla. 1987). In this case, the County neither pled nor proved conduct in addition to, distinguishable from, or independent of a breach of contract. Both the negligence and breach of contract counts against Hill are quite clear on this point. On the one hand, the negligence claim simply states that it is premised on conduct purportedly required by the contract:

> 66. The Defendant, CH2M HILL SOUTHEAST, INC., carelessly and negligently performed its duties owed to the Plaintiff, PINELLAS COUNTY, *under their contract* . . . in the following manner: . . .

(V. 8 at 972 ¶ 66) (emphasis added).

On the other hand, the breach of contract claim against Hill merely adopts and incorporates the allegations of the negligence count to state a breach of contract claim:

> The Defendant, CH2M HILL SOUTHEAST, INC., breached its contract with the Plaintiff, PINELLAS COUNTY, in the manner described in Paragraph 66.

Id. at 979 ¶ 70. No attempt was made to allege conduct that would give rise to a tort. *Id.* at 38-45.

The final judgment also confirmed that the County's negligence claim is predicated on the same conduct that underpins the contract claims

> The Court has also made findings of facts on several claims against CH2M Hill for breach of contract. In essence, Pinellas County has made the same claims against the engineer for negligently falling below the standard of care . . . as Pinellas County's representative in monitoring the construction of the pipeline.
>
> * * * * *
>
> The facts as found and the conclusions. . . . On [the] breach of contract actions . . . support the conclusion that CH2M Hill fell below the engineering standard of care many times. . . . Therefore, the County is entitled to replacement damages against CH2M Hill based upon the theory of negligence.

(R. 4137-38, 4142) (footnotes omitted).

The County's failure to allege or to prove conduct in addition to and separate and distinct from a breach of contract bars recovery in tort. *Lewis*, 428 So.2d at 223; *J. Allen, Inc.*, 571 So.2d at 566; *Electronic Security Systems Corp.*, 482 So.2d at 519; *see also AFM*

Corp., 515 So.2d at 181. Hill's motion for summary judgment on this point should have been granted. (V. 11 at 1363-65; V. 12 at 1590-97).

2. Hill had no statutory duties to the Counts.

Despite identification in the amended complaint that all of the duties Hill "negligently" breached were duties "under the contract," the trial court found that Hill had violated three duties that were independent of the contract: a failure to comply with Chapter 403 governing DER permits, a failure to comply with Chapter 471 governing regulation of professional engineers, and a failure to comply with AWWA specifications.[18/] (V. 8 at 972; R. at 4141-42). The purported breach of alleged statutory duties is nowhere, in any fashion, alleged in the amended complaint. The

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18/ The final judgment does not identify all of the statutory requirements that it finds Hill violated. (R. at 4441). The court 9 failure to identify all provisions purportedly violated is understandable since they were not alleged in the complaint. (V.8 at 935-55, 972-79). In a memorandum of law filed by the County on the issue of negligence, the County argued that Interpace and Hill had violated an independent duty by failing to comply with local health department permit requirements as required by sections 403.850-.864 of the Florida statutes and the administrative rules promulgated thereunder. (V. 11 at 1378 1413). Those provisions and rules regulate drinking water quality and according to the County, required Interpace to follow AWWA C-301, the standard which the final judgment concludes was not followed. Presumably, the court was referring to those same provisions in the judgment, although they are unidentified.

County's failure to allege these "independent" duties, of course, absolutely bars recovery for their purported violation. *E.g.*, *Porter v. Sprague*, 99 Fla. 371, 126 So. 759 (1930); *Freshwater v. Votter*, 511 So.2d 1114 (Fla. 2d DCA 1987); *Lee County Bank v. Winson*, 444 So.2d 459 (Fla. 2d DCA 1983), *rev. denied*, 451 So.2d 851 (Fla. 1984).

Even if the County had pled that Hill had negligently violated statutory "duties," there would still be no liability for at least two reasons. First, and most obviously, Hill's obligation to obtain a DER permit and to comply with that permit was not an independent duty; counsel for the County in fact elicited testimony that this was an obligation encompassed by the contract.[19/] (V. 97 at 14492-493).

Second, neither the statutory provisions governing DER permits (Chapter 403) nor those

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19/ Q. [By the County]: Do you have any recollection, as you sit there, of ever, ever, ever, filing, in compliance with this provision [of the DER/public health department's permit], a document, with the county health department, saying that you had inspected the protect, and it was complete for conformity to the plans and specifications, as approved?

A. Not that I recall.

Q. [By the County]: And that was your duty and responsibility under the contract with the county, was it not, sir?

A. *Yes*, sir.

(V. 97 at 14494) (emphasis added).

provisions regulating the licensure of professional engineers (Chapter 471) confer private rights of action on individuals or entities such as the County. Chapter 403, which governs drinking water quality, provides for the enforcement of DER permits *solely* by DER. *See* § 403.161, Fla. Stat. (1989) (creating liability *to the state*); § 403.121, Fla. Stat. (1989) (establishing judicial and administrative remedies for enforcement bs DER); § 403.131, Fla. Stat. (1989) (providing injunctive relief to DER); § 403.141, Fla. Stat. (1989) (creating civil liability *to the state* for violation of chapter 403). Chapter 471 creates a Board of Professional Engineers within the Department of Regulation and charges that board with responsibility for enforcement of Chapter 471. *See* §§ 471.007, 471.008, 471.031, 471.033, 471.035, Fla. Stat. (1989). Enforcement of section 471.025 -- the provision which the trial court concluded created an independent duty between Hill and the County -- is assigned exclusively to the Board of Professional Engineers through section 471.033.

Where the legislature has declined to create a private right of action, Florida courts are reluctant to imply such a right even where the complaining party appears to be in the class of persons whom the statute

was intended to protect.[20/] *Colonial Penn Communities, Inc. v. Crosles*, 443 So.2d 1030 (Fla. 5th DCA 1983), *rev. denied*, 450 So.2d 486 (Fla. 1984). Since the statutory provisions governing both DER permits and engineer licensure do not create any private rights running to individual citizens, any failure by Hill to comply with those statutory requirements could not, as a matter of law, violate an independent duty between Hill and the County that would support a negligence claim. As for the purported failure to apply appropriate standards to include AWWA standards where applicable, that too fails to rise to the level of an

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20/ Although no Florida decision has yet expressly detailed the criteria relevant to determining whether a private right of action should be implied, the United States Supreme Court has identified four relevant factors (only three of which would apply to a state court) for making such a determinations first, whether the plaintiff is one of the class for whose *especial* benefit the statute was enacted; second, whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; and third, whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff. *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1985).

All three tests are flunked in this case. Neither Chapter 403 nor Chapter 471 "especially" benefits, and neither creates a right in favor of private entities such as the County. There certainly is no indication that the legislature intended to create a private remedy in either of these chapters, and the remedy sought by the County does not aid the primary goal advanced by either Chapter 403 or 407. An award of damages to the County will neither affect the quality of the County's drinking water nor prevent an unqualified engineer from continuing to practice engineering.

independent duty which would support a tort claim.[21/] (R. 4141); *see Lewis*, 428 So.2d at 223; *J. Allen, Inc.*, 571 So.2d at 566; *Electronic Security Systems Corp.*, 482 So.2d at 519. The obligation to comply with AWWA standards (where applicable) was imposed by contract. (V. 128 at 10942 A3, E2; *Id.* at 19043 p. 15060-1, 2 [REV]; *Id.* at 19045).

3. The County Presented no proof of damages sufficient to support a tort recovery.

The County not only failed to plead and to prove tortious conduct separate and distinct from a breach of contract, it also failed to establish damages that would support a tort claim. Both this court and the Florida Supreme Court have held that a tort action cannot be brought to recover for so-called "economic losses," as opposed to personal injury or property damages.

> [T]he damages sustained by [a] tort must be of a particular kind. . . . '[W]ithout some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses.'

John Brown Automation, Inc. v. Nobles, 537 So.2d 614, 617 (Fla. 2d DCA 1988) (citation omitted), *rev. denied*, 547 So. 2d 1210 (Fla. 1989), *quoting, AFM Corp.*, 515

21/ The County consistently alleged that AWWA specifications were contract obligations. (V. 8 at 938, 943-57, 972-79).

So.2d at 180; *see also Westinghouse*, 510 So.2d at 899; *Strickland-Collins Construction v. Barnett Bank of Naples*, 545 So.2d 476 (Fla. 2d DCA 1989). A tort claim cannot be brought to recover for damage primarily to the product itself, as distinct from injury to a person or property.

The theory which bars economic loss recoveries is basic: manufacturers in a commercial setting have no duty in tort to prevent a product from harming itself. *Westinghouse*, 510 So.2d at 901. Where the gist of a claim is that a product failed to perform, causing damage to itself, the claim for relief sounds in contract and not in tort. *Id.*

These principles are equally applicable where there is minimal damage to supporting or surrounding property, incidental to the damage done to the product itself. In *Florida Power & Light Co. v. McGraw Edison Co.*, 696 F. Supp. 617 (S.D. Fla. 1988), *aff'd*, 875 F.2d 873 (11th Cir. 1989) (table), for example, a transformer exploded, destroying itself and causing damage to surrounding walls, curbing and adjacent pipes. Relying on the *Westinghouse* decision, the court concluded that those damages were minimal and not compensable in tort -- that is, they did not constitute sufficient damage to other property to remove the action from the policies and principles governing economic loss in contract actions.

Here, as in *Florida Power & Light*, the damage sustained was almost wholly to the product itself -- the pipeline. (V. 82 at 12160-161; V. 83 at 12178, 12181, 12286; V. 186 at 24288, 24291). There was no injury to any person. By law, the County's action was for

economic loss, i.e., damage to the pipeline itself, and the County was limited to recovery on its contract claim.

The principles underlying the economic loss rule apply in Florida no matter how suddenly a product damages itself. A so-called "calamitous event" exception which has been accepted in some jurisdictions was rejected by the Florida Supreme Court when, in its *Westinghouse* decision, the court approved *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986). *See Westinghouse*, 510 So.2d at 902. The high court in that case both adopted the economic loss rule and rejected the calamitous event exception. *East River*, 476 U.S. at 870. The trial judge exceeded his authority when he accepted the County's contention that the suddenness of the one, in-service break in the pipeline exempted this action from the economic loss rule.

Nor was the trial court on-firm legal ground when it created out of thin air the notion that, as a matter of law, *Westinghouse* and *AFM* did not apply to contracts for the purchase of professional skill, judgment and expertise such as contracts with professional engineers. (R. at 4137; v. 12 at 1590-97). *Westinghouse* in fact turned in part upon a claim for negligent design of the nuclear-powered steam generators, and the plaintiff had specifically alleged a failure of professional expertise and skill:

> Florida Power & Light alleges that Westinghouse negligently *designed* and manufactured the steam generators, failed to provide proper operating instructions,

> and failed to warn of potential problems. Further, Florida Power & Light claims that Westinghouse knew that Florida Power & Light was relying on their proffered expertise in nuclear power and their conduct was the direct cause of Florida Power & Light's injuries.

Westinghouse, 510 So.2d at 900 (emphasis added). Despite these alleged breaches of professional skill, expertise and duty, the *Westinghouse* court held that no tort action would lie absent a claim for damages for personal injury, or damage to property outside the scope of the parties' contract.

AFM also addressed the professional services issue, and made no exception to the announced rule on tort claims for economic damages. In *AFM*, the court actually extended its earlier announced rule in *Westinghouse* to service contracts in general.

B. Hill is not liable for breach of contract.

The County's final judgment against Hill hinges on three alleged breaches of contract. For one thing, the court held that Hill had contracted to inspect the manufacture of pipe segments based on the County's contention that references to "contractor" and the "construction site" in the Hill Contract are not references to the pipeline installation process, but rather are references to the pipe segment manufacturing process. For another, the court held that Hill had contractual duties under the Interpace

Contract -- a document entered into between the County and Interpace nearly two years following execution of the Hill Contract -- based on a theory of document "merger." The court additionally ruled that Hill had breached its contractual design responsibilities by allowing Interpace's use of class IV wire for the pipeline, and by underdesigning the operating pressure for pipe segments. None of these bases for finding a contract breach is supportable in the record or in law.

1. Hill had no contractual duty to inspect the manufacture of Pipe segments.

The trial court's final judgment concludes that Hill was required as part of its Item A design duties to perform engineering services in connection with the process of manufacturing pipe segments. There is no such directive in Item A of the Hill Contract. The trial judge was persuaded that the terms "contractor" and "construction site" in the Hill Contract were references to the pipe segment manufacturing process, rather than to the pipeline installation process. A plain reading of that document belies that interpretation, however, and the context of its drafting and execution confirms that the language used could only mean the contrary.

The language in Item A of the Hill Contract makes clear that Hill's design functions encompass duties relevant to the design of the pipeline system, not the manufacture of the pipe segments. For example, Item A-1 anticipated that Hill would consult regarding "property, boundary, right of way, topographic and utility surveys," each patently relating to the location of

the pipeline. Consistently, Item A-3 called for Hill to draft specifications and schedules for the proposed improvements, meaning, of course, the pipeline system. (V. 128 at 19042).

References to "construction site" and "contractor" in Items A and B can only relate to installation of the pipeline. Item A-5 directs Hill to "advise prospective bidders, suppliers of construction materials, and equipment manufacturers." *Id.* at 19042. To "advise" *prospective* bidders, suppliers and equipment manufacturers could not have meant to inspect and oversee pipe segment manufacturing, for in 1975 when the Hill Contract was signed, there was no pipe segment manufacturer. None had even bid the job, let alone been selected to manufacture pipe segments.

In Item A-6, Hill was made responsible for "canvassing construction proposals, and [making] engineering recommendations in awarding of construction contract or contracts." *Id.* Use of the word "construction" in Item A-6 correlates with the identification of bidders, suppliers and manufacturers in Item A-5, relating to advisory services for *prospective* parties.

Just as plainly, Item B also identified services to be performed by Hill which related only to installation of the pipeline. All paragraphs in Item 8 discuss phases and features of procedures common to a contract between e consulting engineer on the one side, and an owner-general contractor on the other, such as visits to the construction site (Item B-1), preparation of routine change orders and stop work orders (Item B-4), recommendations regarding final acceptance of

construction work (Item B-6), and completion of a set of prints for each construction contract changed during the construction process (Item B-7). Significantly, the concluding, unnumbered paragraph of Item B provided that Hill's professional services during construction were *not* to include "the testing of materials or the furnishing of resident project representatives, field engineers, and inspection personnel." It is impossible to reconcile the installation-oversight duties of Hill with an obligation to control the manufacturing process when the contract expressly excluded materials testing and furnishing inspection personnel.[22/] Item C of the Hill Contract proves the point further. The first paragraph of Item C proposes that Hill would furnish "resident engineer" services "to observe the *construction* work of the *contractor* on a daily basis." (Emphasis added). These services were to have included:

> field observation, inspection of materials and work, . . . preparation of daily progress reports, monthly summaries . . . reviews, verifications and estimates for payments to contractors.

The County never authorized Hill to perform Item C services; instead, the County itself took direct responsibility for all "resident engineer" tasks. (V. 76 at 11484; V. 77 at 11279-280, 11308-309; V. 96 at 14249, 14256). The second paragraph of Item C calls for "on-site observations of the work and progress, and field

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22/ The very location of the Item B exclusion is in the midst of a discussion of "construction" duties and construction "contractor" related to the installation of pipeline, not the pipe segment manufacturer.

checks of materials and equipment." The "field checks" provision with regard to materials and equipment again confirm that Item C's discussion of "construction" related services is a discussion of matters to occur at the pipeline installation site, not a pipe manufacturing factory.

These plain readings of the language of the Hill Contract are bolstered by the context of its drafting. No one knew when the Hill Contract was signed in 1975 that the County would elect to save sales tax some two years later by contracting directly with a pipe supplier, rather than going through a general contractor. Indeed, the County's primary contract negotiator acknowledged that the Hill Contract was signed at a time when the County intended to use a single contractor both to purchase the pipe and to install the line. (V. 76 at 11177). Design phase supervisory services by Hill, which were completed before a pipe supplier was even selected, could not have plausibly been intended to include pipe manufacturing supervisory services.

The plain language of the Hill Contract is at odds with the County's contention, as adopted in the final judgment, that Hill's engineering services required supervision over pipe segment manufacture. It was error for the judge to conclude that Hill breached a contractual duty to perform pipe segment manufacture-related duties.

2. Hill could not be held to a contractual duty under the County's contract with Interpace through the legal fiction of a "merger" of two separate documents.

A second basis for finding Hill in breach is the final judgment's legal fiction of "merger" of the Hill Contract with the Interpace Contract.[23/] Hill was not a signatory to the Interpace agreement. The latter was signed almost two years after Hill's contract. Not one case is identified in the final judgment for the proposition that a non-signatory to a contract is obligated to perform duties identified within that contract, let alone when the two documents are not contemporaneous. The County argued its theory of contract merger -- in order to bind Hill to the terms in the Interpace Contract -- by invoking two doctrines of judicial construction: *"in pari materia* and "construction against the drafter." Neither legal theory has any sound or legitimate application to this circumstance.

Not surprisingly, the final judgment does not rely on any case in which the *in pari materia* doctrine was utilized in a like circumstance. Its sole reliance is on *Standard Newspapers, Inc. v. Woods*, 110 So.2d 397 (Fla. 1959), where a second, contemporaneous and interdependent contract was signed because the first would not have been entered without the other. Under these circumstances, the court construed the second

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23/ This fall-back thesis inherently acknowledges that the Hill Contract, standing alone, could not support liability for manufacturing-related duties.

contract as being *in pari materia* with the first. Quite clearly, there is no similarity between the *Woods* situation and this one. Unlike *Woods*, Hill did not benefit from the Interpace Contract. Unlike *Woods*, the Interpace Contract was not contemporaneous in time with the Hill Contract. Unlike *Woods*, the 1975 Hill Contract was not contingent on the 1977 Interpace Contract. The trial court's acceptance of the County's second doctrine of judicial construction -- construing agreements against the drafter -- is equally far afield. That doctrine applies only where a signatory to an agreement has drafted the document. The doctrine has never been applied in Florida to impose duties on a non-party. Again, the cases identified in the final judgment reflect a very different situation -- the typical circumstance of construing a contract against the signator-drafter.[24/]

The importation of a "merger" doctrine into this case is ludicrous. As stated in *In re: Estate of Samuel Donner*, 364 So.2d 742 (Fla. 3d DCA 1978):

> Ordinarily, a contract cannot bind one who is not a party thereto since to create a valid contract there must be reciprocal assent to a certain and definite proposition.

(Citations omitted); *see also Ogden v. Groves*, 241 So.2d 756 (Fla. 1st DCA 1970). Likewise, in *Jenkins v. City*

24/ *Sol Walker & Co. v. Seaboard Coast Line R.R. Co.*, 362 So.2d 45 (Fla. 2d DCA 1978); *Bouden v. Walker*, 266 So.2d 353 (Fla. 2d DCA 1972); *Allegheny Mutual Casualty Co. v. State*, 176 So.2d 362 (Fla. 2d DCA 1965).

Ice & Fuel Co., 118 Fla. 795, 160 So. 215, 217 (Fla. 1935), the court recognized that

> A third party is not liable as a rule upon a contract, express or implied, unless he was one of the immediate parties to the agreement or has become a party to it by subsequent agreement with the original parties.

The trial court's conclusion -- that the identification of engineering duties in the Interpace Contract bound Hill to perform those duties -- should be compared with the reasoning in *Lawrence v. United States*, 378 F.2d 452, 461-62 (5th Cir. 1967):

> A person is not made a party to a contract merely by being named and described in it or merely by the fact that such a contract is referred to in a second instrument in a way to evidence that such person is a party in another contract. This is especially true if the parties are different, are not identical, or there is an absence of one or more significant elements of identity.

(Footnotes omitted).

The Florida Supreme Court recently demonstrated the narrow circumstances which must pertain to tie together and merge two distinct contracts. *OBS Company, Inc. v. Pace Construction Corp.*, 558 So.2d 404 (Fla. 1990), involved a lawsuit between subcontractor (OBS) and general contractor (Pace).

Pace alone was in direct contractual relationship with the owner. OBS had only a direct contractual relationship with Pace. When OBS sued, Pace defended by asserting it had not been paid by the owner, and therefore it should not have to pay OBS.

Because OBS' agreement with Pace contained a provision which expressly incorporated the agreement between the owner and Pace as part of the Pace contract with OBS, the court was able to link the two agreements and require Pace (as signatory to both contracts) to pay OBS. There is a complete absence of any comparable incorporation by reference in this case. The only common signatory to the contracts here was the County, not Hill.

A case factually akin to this one is *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tx. 1982). In *Johnson*, a non-party architect/engineer was charged with a breach of a contract between the construction contractor and the owner, based on the allegation that the non-party engineer had assumed the obligations specifically assigned to it in that owner-contractor contract. The court rejected the attempted use of the contractor-owner's contract as a basis to impose liability on the architect/engineer, finding it to be unheard of and without legal support. The court lucidly explained that the substantive law on breach of contract exists because of the societal interest in having a person perform his promises, whether express or implied, so that actions for breach of contract "are inherently possible against promisors only." 630 S.W.2d at 369. While duties for the engineer may have been expressed in a contract to which it was not a party, due to the fact

it "was not in legal contemplation a party to the contract, it owed no contract-based duty to [the contractor]."[25/] 630 S.W.2d at 370. The artificiality of the court's "merger" theory is exposed more vividly by reviewing the language of the Interpace Contract, to which Hill was not a party. That 1977 contract defined Interpace as "supplier," not the unnamed "contractor" in the 1975 Hill Contract.[26/] The terms of the Interpace Contract, moreover, were all keyed to engineering services relative to post-manufacture activities when pipe segments were delivered to the installation site. For example, section C-03(a) of the Interpace Contract provided that

> All materials furnished, when not in accordance with the intent of the Plans and Specifications, will be rejected *and shall be removed immediately* and replaced by suitable and satisfactory materials. . . .

(V. 8 at 994 C-2) (emphasis added). This language deals with the *removal* of pipe segments brought to the

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25/ *Haddad v. Bagwell*, 317 S.W.2d 781 (Tx. 1958), is a similar case involving an owner's claim against an architect where the owner's contract was solely with a contractor. That case had the some outcome. The court held that the architect was entitled to summary judgment in the owner's suit since he was not an immediate party to the contract, not one for whose benefit it was made, and not in privity.

26/ In fact, the term "constructing" in the definition of "supplier" is expressly said to pertain "for purposes of *this* Contract" [meaning the Interpace Contract]. A logical correlation of the two contracts would identify Interpace as the "materials supplier" or the "equipment manufacturer" mentioned in the Hill Contract.

installation site for failure to meet design drawings, plans and specifications.

Section C-03(a-1) authorizes the owner to stop supply of the pipe "[i]f the supplier fails to *remove* any defective materials . . ." (emphasis added), plainly relating to delivered or installed pipes which proved to be defective and were to be removed from the system. Section C-03(b) places the burden on Interpace, as the supplier, to confirm with the engineer through independent testing that the pipe segments have passed tests prior to delivery, and section G provides that Interpace, as supplier, has agreed "to permit a representative of the county, and/or its engineer . . . to inspect the work in progress. . . ." (V. 8 at 1020 G-3 ¶ 6). Interestingly, this latter section, which *does* specifically relate to the manufacturing site, provides only a right, not a duty of inspection at the manufacturing plant.[27/]

Finally, if the terms of these respective contracts were doubtful as to the absence of any contractual duty on Hill, and if there were a doctrine of merger in a case such as this, the performance of the parties in relation to the provisions of the contracts removes any possible view of the contracts as requiring Hill to inspect the

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27/ The County in fact inspected the manufacturing plant repeatedly. (V. 96 at 14229-231, 14245-246, 14257-259, 14281). Section G-3 in the Interpace Contract also belies the interpretation given the provision of Hill's contract which called for four monthly visits to the "construction site." Were those four visits actually meant to be to the factory, then Hill's mere option to visit the factory, as contained within the Interpace Contract, would have been meaningless.

pipe manufacture plant.[28/] The County was designated as the recipient of any testing data to be provided by the manufacturer. (V. 8 at 981; V. 128 at 19043 p. 1010-3, 15060-2 [REV]). If the County desired additional laboratory testing of the manufactured pipe segments and desired that testing be done by Hill, the County was required to request those services specifically under Item D of the Hill contract. The County never did this.[29/]

In point of fact, the County had obtained tests of components of pipe samples from Interpace's Lacoochee pipe manufacturing plant, and County employees visited the Lacoochee pipe plant several times. (V. 96 at 14229-231, 14245-246, 14257-259, 14281). The County even suspected that the aggregate used to manufacture the concrete coating of the pipe was inadequate. (V. 84 at 12412-413).

The Hill Contract and the Interpace Contract are not legally or factually susceptible of merger, and the parties' course of performance directs a conclusion to the contrary because the County reserved to itself and in fact performed all "resident engineering" duties. The

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28/ The final judgment wrongly concludes that if Hill was not performing duties related to resident engineering at the pipeline, then no one was performing those duties. The County had itself assumed these resident engineering and inspection services. (V. 96 at 14255-256).

29/ Neither the Hill Contract nor the Interpace Contract imposed a materials testing obligation on Hill. This was Interpace's obligation primarily, with an adjunct responsibility of the County to obtain further materials testing if it deemed necessary. (V. 8 at 995).

trial judge's conclusion (acting through the County's mind and pen) that only Hill was available to protect the County, is nowhere supported in the record or in law.

3. Hill's pipeline design was free of defects.

a. Hill did not breach its contract in relation to Interpace's use of class IV wire in pipe segments.

The trial court's final judgment found that Hill breached its contract by allowing Interpace to use class IV wire. Class IV wire was appropriate under the standards in existence at the time, however. The trial court has applied 1909 opinion testimony to interpret a 1977 contract, notwithstanding that Class IV wire conformed with AWWA C-301 standards when the Interpace Contract was made. When Interpace contracted with the County to provide manufactured pipe segments, it agreed that segments would comply with AWWA C-301 standards, and Interpace in fact submitted shop drawings which specified that the pipe segments would be manufactured in accordance with AWWA specification C-301-72. (V. 128 at 19045). That standard specifies wire conforming to ASTM Designation A-227, but also provides that

> wire with specified minimum tensile strengths exceeding those in A-227, class II, may be used if the wire meets the other requirements for class II in that

> specification, and the pipe design may be based on those higher strengths.

(V. 128 at 19041). By definition, class IV wire has a higher minimum tensile strength than class II wire, and it can be manufactured to meet all the other requirements for class II set forth in A-227. (V. 112 at 16858-859, 16863, 16868-869; V. 248 at 28040 pp. 156-69).

The chairman of the committee which authored AWWA C-301 in 1972 ("C-301-72"), Walter Neubauer, testified that class IV wire was plainly allowed and contemplated as a product meeting AWWA C-301-72. (V. 112 at 16835-920). Two other individuals who sat on the standards committee agreed that class IV wire could be used under that standard. (V. 93 at 13749, 13767, 13772, 13792-796). That fact was even acknowledged by the County's own expert, John Kiefer, and County experts who had tested the class IV wire used in pipe segments on this project found that it passed all specific A-227 test requirements. (V. 99 at 14738 pp. 156-59 and see this brief at p. 9, line 1-2).

Nonetheless, at trial the County arrayed a chorus of so-called expert voices consisting of engineers and metallurgists, none of whom ever sat on or participated in the work of the standards committee, who took a different view of AWWA C-301-72. This group contended from their 1989 vantage point that the standard should be read to permit tensile strengths exceeding the class II minimum, but only within the class II tensile range. (V. 39 at 5923-25 V. 46 at 6894, 6945-46; V. 50 at 7445-46; V. 60 at 8843; V. 168 at 21835 pp. 106-07, 116). This interpretation, of course,

would make C-301-72 wholly redundant with A-227, which *already* allowed for use of wire with tensile strengths inclusive of the class II maximum.

There was no testimonial dispute at trial among standards experts on the acceptability of class IV wire. The testimony of County witnesses who found a different meaning in the language some 17 years after it was written does not detract one whit from the fact that a reasonable design engineer in 1977 would readily have approved the use of class IV wire as being in compliance with C-301-72. Their disagreement as to what the standard would allow suggests, at best, an ambiguity in its wording. But any engineer in 1977 who believed there was ambiguity in C-301-72 and been concerned on receipt of Interpace's submittal sheet identifying its intention to use class IV wire, logically would first have contacted the drafting committee of the standard to inquire regarding the committee's intent. The uniform testimony at trial shows the answer they would have received class IV was perfectly proper under AWWA C-301-72. Hence, it was clearly reasonable for Hill to have accepted Interpace's selection of class IV wire in 1977.[30/] (V. 112 at 16858-861).

The trial court's conclusion that class IV wire was not authorized for this pipeline is also legally defective. It contradicts the prohibition in Florida law against a court's reinterpretation of contract language which is otherwise clear and unambiguous. *See*

30/ Interestingly, the County's own engineer, Mike Flanery, used the *same specifications* both before and after this project and allowed the use of class IV wire. (V. 84 at 12471-476).

Hamilton Construction Co. v. Board of Public Construction, 65 So.2d 729 (Fla. 1983); *Paddock v. Bay Concrete Industries, Inc.*, 154 So.2d 313 (Fla. 2d DCA 1963). It makes Hill, in its role as design engineer, a guarantor of the proper manufacture of pipe by Interpace, contrary to Florida law that a design professional's obligations do not include the guarantee of a perfect plan or a satisfactory result. *Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507 (Fla. 1918). A design professional is obliged only to perform contractual duties in accordance with the professional "standard of care used by similar professionals in the community under similar circumstances." *Lochrane Engineering, Inc. v. Willingham Realgrowth Investment Fund, Ltd.*, 552 So.2d 228, 232 (Fla. 5th DCA 1989), *rev. denied., sub nom., Anderson v. Willingham Realgrowth Investment Fund, Ltd.*, 563 So.2d 631 (Fla. 1990); *see also Ahimsa Technic, Inc. v. Lighthouse Shores Town homes Development Co., Inc.*, 543 So.2d 422 (Fla. 5th DCA 1989). The evidence was overwhelming that the specifications drafted by Hill and ultimately utilized by the County and Interpace as part of the Interpace Contract, including those for class IV wire, were well within the standard of professional care owed by a design engineer in its contractual relationships.[31/]

31/ If accepted, the guarantee theory of the trial court would usher in an age of unlimited liability for all engineers or architects submitting design plans to be administered by contractors and others. This very concern was acknowledged in *E.C. Goldman, Inc. v. A/R/C Associates, Inc.*, 543 So.2d 1268 (Fla. 5th DCA), *rev. denied*, 551 So.2d 461 (Fla. 1989), as one which would curtail the entire profession of consulting services, contrary to the public

(continued...)

b. Hill did not breach its contract in relation to pipeline pressure.

The County's ghost-written final judgment hints that Hill breached a contractual duty by failing to design a pipeline for operation at 150 psi. This is another baseless conclusion.[32] The Hill Contract incorporated the design assumptions of the County's Master Plan, which called for 100 psi operating pressures only.[33] In any event, Hill specified (and in turn Interpace manufactured) pipe segments in fact designed to operate at 150 psi, with a protective surge component to 210 psi. (V. 128 at 19043 pp. 15060-1 [REV]; *Id.* at 19045). The County consistently has operated the pipeline at or below 100 psi anyhow. (V. 83 at 12238-240, 12246, 12293).

31/ (...continued)
policy of this state. The engineer or architect would be cast as responsible party for the defect-free functioning of numerous components manufactured by different companies located in different places across the country.

32/ The County's evidence on this point is not a breach of a 1975 contract which called for 100 psi pressures, but rather the speculation that pressures to 150 psi may be required at some time in the future. (V. 83 at 12236-239; V. 84 at 12388, 12499-501).

33/ Other components of the pipeline such as meters, not just the pipe segments, were also designed to operate below 150 psi. (V. 42 at 27704, 27705; V. 99 at 14786). This integrated pipeline project was never conceived by Hill or the County to *operate* at 150 psi, whatever operating pressure over 100 psi the pipe segments may have been manufactured to withstand.

III. The trial court exceeded its authority in awarding the damages equal to the cost of replacing the entire pipeline with improved components.

The trial court concluded that each and every one of the 3,400 pipe segments manufactured by Interpace contained manufacturing defects so as to warrant immediate replacement of the entire 13.5 mile pipeline. Hill, the design engineer which was paid $365,000 for its services, was ordered to pay $17,800,000 as a replacement cost, plus another $1,447,832 for structural improvements to the pipeline. Those awards are erroneous on a number of bases, each alone mandating reversal.

A. The trial judge improperly held Hill liable for replacement of the entire pipeline.

The replacement award of $17.8 million against Hill is predicated on the trial court's conclusion that each and every pipe segment in the entire pipeline contained five "manufacturing defects": (1) mortar coating that is too porous; (2) insufficient slurry encasing the wire wrapped around each pipe core; (3) improperly cured cement cores; (4) improper materials (aggregates) used in core manufacture; and (5) defective wire used to wrap each pipe core. (R. at 4008-9; *see also* R. at 4010-62, 4083). Hill had no

connection whatsoever to the first four of these alleged defects.[34/] (Hill Init. Brief at IIB).

An award of full replacement cost because Hill approved the use of class IV wire for the pipe segments is preposterous. For one thing, Hill neither participated in the design nor in the manufacture of that wire, which took place in a facility located in Solon, Ohio, far from where the pipe segments were fabricated. For another, *any* replacement cost award is simply untenable on this record. At best the County proved entitlement for pipeline *repair* damage.

The predicate for every damage award, whether sounding in contract or in tort, is to provide fair and just compensation commensurate with the actual harm occasioned by the breach or tort. *Hanna v. Martin*, 49 So.2d 585 (Fla. 1950); *Bank of Miami Beach v. Newman*, 163 So.2d 333 (Fla. 3d DCA 1964). Damages may only be awarded where actual harm resulting from a breach or tort can be demonstrated with reasonable certainty. *Saporito v. Bone*, 195 So.2d 244 (Fla. 2d DCA 1967) (the rule of reasonable certainty is applicable to establishing the existence of injury or harm as well as to the amount or extent of the loss); *see also E.F.K. Collins Corp. v. S.M.M.G., Inc.*, 464 So.2d 214 (Fla. 3d DCA 1985). Plaintiff bears the burden of establishing both actual loss or harm arising from a breach or tort and the extent of that loss measured in money. *Saporito*,

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34/ Interpace alone chose the materials for manufacture of its pipe cores, and was solely responsible for curing the cores after manufacture. Hill also played no role in the application of slurry to the cores and wires or in the mixing and application of mortar to the pipe. *Id.*

195 So.2d at 245; *United Steel & Strip Corp. v. Monex Corp.*, 310 So.2d 339 (Fla. 3d DCA 1975). The County failed to carry its dual burden. Indeed, it knowingly and intentionally made no attempt to do so.

The County claimed, and the final judgment echoed, that under the terms of the County's contracts with Hill and Interpace, the County had contracted to obtain a pipeline that would transport water to meet its community needs for at least 100 years. (V. 8 at 957, 960, 978; R. at 3979, 3988-91). It was undisputed at trial that the County's pipeline had in fact transported water that met the County's needs for at least twelve years. (R. at 4164; *e.g.*, V. 72 at 10708; V. 73 at 10832-836). The County contended, however, that the pipeline was so riddled with defects that the County was entitled to have the entire pipeline replaced, and that full replacement must be made "immediately." (V. 8 at 959-64, 968-69, 979).

The County spent considerable money and time at trial attempting to establish the existence of alleged manufacturing defects. (V. 33-45, 101, 121; V. 41 at 6172-6325; V. 67-73). In contrast, it refused to present any evidence whatsoever to establish the need for immediate replacement, relying instead on a claim that another rupture *might* cause public injury or harm. (V. 70 at 10404-405; V. 72 at 10702-709; V. 73 at 10833-834). The trial court accepted the County's imminent harm theory without requiring proof that any harm or injury had ever occurred or was reasonably

likely to occur, not even from the one and only rupture in 1979.[35] (R. at 4050, 4151, 4164).

The County's inability to prove harm, and indeed its refusal to even attempt to do so, is understandable. By the time final judgment was entered, the pipeline (alleged defects and all) had been operating on a daily basis for twelve years, with the exception of one in-service break in 1979 and one rupture in 1980 during a pressure test performed for the specific purpose of identifying problem pipe segments.[36] (V. 35 at 5215-20; V. 73 at 10831-834). Consequently, at the time of trial, the County had sustained no injury or loss from Hill's or Interpace is purported breach of contract, other than repair costs relating to those two failures.

Unfounded speculation of possible future harm to the public, needless to say, provides no substitute for competent, substantial evidence of the pipeline's remaining useful life (the County's real alleged "harm"), and no legal basis for immediate replacement of entire line. In *Adler v. Seligman*, 438 So.2d 1063, 1066 (Fla. 4th DCA 1983), the court reversed an award of damages to reconstruct 42 stairwells where there had been no showing of harm.

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[35] The County made no effort whatsoever to show the probability of a rupture in the future, or of the reasonable probability of replacing the entire pipeline in the next 88 years. In fact, the County knowingly elected not to undertake studies necessary to ascertain the future life of the pipeline. (V. 70 at 10405-406; V. 72 at 10702-709).

[36] The County conducted two additional pressure tests in 1982 and 1985, and sustained no failures during either test. (V. 43 at 6499-501; V. 221 at 27162).

> The damages here were improper because they did not involve actual damages to Seligman, but instead were in the nature of damages for repairs which *might occur in the future*. On retrial, Seligman shall be entitled to recover future damages *only if it can be* shown that the repairs will necessarily occur and that Seligman will be responsible for them.

(Emphasis added); *see also Hanna*, 49 So.2d at 587; *Saporito*, 195 So.2d 245; *E.F.K. Collins Corp.*, 464 So.2d at 214; *Bank of Miami Beach*, 163 So.2d at 333.

Although the County was entitled to no award beyond repair damages, the final judgment holds that the County was entitled to replace the entire 13.5 mile pipeline for $17.8 million because there was a possibility of harm to the public from future ruptures. (R. at 3987, 4009, 4016, 4020, 4050, 4151). That finding is insufficient as a matter of law to support an award of damages, let alone a replacement cost award, in the absence of any evidence whatsoever that the pipeline would no longer deliver water as it had for the past twelve years.[37/] *Id.*

37/ The County introduced no competent substantial evidence to establish that the pipeline will incur another rupture during its alleged remaining 88-year life, or that there is any likelihood that a rupture during those 88 years will inflict injuries on any member of the public. The totality of competent evidence on this point is to the contrary. Dr. Jerrell Thomas, an aerospace engineer who had worked as a NASA engineer on the Redstone and Jupiter missiles, on Saturn I and V, the Lunar Rover, Apollo-Soyuz, and the

(continued...)

The County's contract with Hill does not guarantee a flawless, failure-proof pipeline. *See Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507 (1918); *Lochrane Engineering, Inc.*, 552 So.2d at 228. Neither Interpace nor Hill guaranteed a pipeline that would never sustain a disruption or failure in 100 years.[38] *Id.* The failure of one or more pipe segments, or even the prospect of other such failures over the prospective life of the pipeline, does not entitle the County to replace the entire pipeline. *Id.*; *Adler*, 438 So.2d at 1066.

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[37] (...continued)

space shuttle, was qualified as an expert in stress analysis of complex structures, in reliability modeling, and in reliability and risk analysis. (V. 119 at 17660, 17763, 17666, 17668-671, 17704; V. 237 at 27635). Based on studies he had performed on this very pipeline, and using the County's hypothesis of an original life for the pipeline of 100 years, he testified that the annual probability of another rupture in this pipeline between the years 1989 and 1994 was one in a million. (V. 119 st 17770-772, 17718-720; 17828). He also testified that the annual probability of a rupture in this system from 1994 to the year 2078 (the remainder of the alleged 100-year life span for the pipeline) was 4 in 10,000 -- that is, a 97% probability that this pipeline would not experience another rupture at any time from the date of trial until 2078, the end of its alleged contract lifetime. *Id.* He compared the risk of a fatality from a rupture to the risk of a workman fatality during replacement of the pipeline, and concluded that the risk of a workman fatality during replacement of the line far exceeded the risk of a fatality from a future rupture. *Id.*; (V. 12 at 17889-890).

[38] One of the County's expert witnesses verified that this structure was subject to natural deterioration over time. (V. 123 at 18400, 18402-403).

In *Grossman Holdings, Ltd. v. Hourihan*, 414 So.2d 1037 (Fla. 1982), the Court adopted section 346(1)(a) of the Restatement (First) of Contracts, which might have entitled the County to immediate replacement of all 3,400 pipe segments in the 13.5 miles of pipeline if, and only if, the County had proved that the entire pipeline was worthless or dysfunctional. (Such proof would not have been possible, of course, given the County's continuous use of the line). Corbin notes that even section 346(1)(a), however, does not permit replacement cost if replacement will result in unreasonable economic waste:

> For a breach by defective construction . . . the injured party can get a judgment for damages measured by the reasonable cost of reconstruction . . . in accordance with the contract, if it is possible and does not involve unreasonable economic waste. Sometimes the defects in a structure cannot be physically remedied without tearing down and rebuilding. In many such cases, the structure as it exists, even though it is not exactly in accordance with the contract requirements, is such that it will render substantially all of the service that the structure contracted for would have rendered; and reconstruction and completion in accordance with the contract may be possible only at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method involving such economic waste.

5 A. Corbin, *Corbin on Contracts*, § 1089 (1964) (footnotes omitted).

In order to avoid the economic waste doctrine, the County was obliged to establish that the pipeline was no longer capable of rendering substantially all of the service that the County contracted to receive. The County in no wise satisfied this condition.[39/]

The most compelling evidence on the issue of damages came from the County's own expert witness, who testified that the pipeline in fact had a service life beyond the date of trial. (V. 72 at 10711). That testimony, combined with the County's admission that it could have ascertained the remaining service life of this pipeline but chose not to, confirms that the County did not establish the element of harm necessary to recover an immediate (or indeed any other) replacement award.[40/] (V. 70 at 10404-406).

39/ Under subsection (ii) of Restatement section 346(a)(1), the County might have sought damages in an amount equal to the difference between the value of the structure contracted for and the value of the structure received. Restatement (First) of Contracts § 346(1)(a)(ii)(1932). Since the pipeline had performed exactly as contracted for, no damage award under this provision was possible.

40/ Even the amount of that award is inaccurate. The $17,106,715 replacement award is overstated by over $700,000, based on the known cost for replacement pipe segments. (V. 113 at 16931-933, 16944-445, 16959, 16960-511; V. 206 at 26625, 26627). This overstatement is over and above those replacement overcharges detailed in Madison Management Group, Inc.'s brief, which equally apply to the replacement award against Hill.

B. The trial judge improperly awarded "betterment" damages.

The court awarded $783,388 to the County to compensate for the cost of upgrading the original pipeline with an epoxy coating, and $664,444 to redo the original (and already paid for) pipeline design. (R. at 4119, 4158-61; V. 206 at 26627). Although these amounts may appear insignificant in the context of a $19.8 million award, they are large dollar amounts and typify the bias which pervades every aspect of this case.

It is axiomatic that, when neither the specifications nor design are deficient for the original intended purpose, there can be no damage award beyond the cost of restoring the structure to its original design. *Grossman v. Sea Air Towers, Ltd.*, 513 So.2d 686 (Fla. 3d DCA 1987), *rev. denied*, 520 So.2d 584 (Fla. 1988); *see also Temple Beth Sholom v. Thyne Construction Corp.*, 399 So.2d 525 (Fla. 2d DCA 1981) (an owner's recovery for correction of design defects is limited to the reasonable cost of repair or replacement according to the original design) *Barile Excavating & Pipeline Co., Inc. v. Kendall Properties, Inc.*, 462 So.2d 1129 (Fla. 4th DCA 1984). If an owner decides during the course of replacement or repair to adopt a more expensive design, the additional expenses incurred for such "betterments" are chargeable solely to the owner. *Id.* These controlling principles come into play even more dramatically in relation to an award for replacement pipe having an epoxy coating -- one that was not specified in the original pipeline contract.

The court awarded over $780,000 for an epoxy coating of the new line. Even the ubiquitous Robert

Edmunds, the County's chief expert witness, had to acknowledge that Hill did *not* breach any contractual or professional duty by failing to require epoxy coating of the original pipeline:

> Q.: . . . In view of what you've told us about the soils and groundwater, do you have an opinion as to whether or not [Hill] should have specified a coating, an epoxy coating or the like, for the pipe in this pipeline.
>
> * * * * *
>
> A.: . . . I think, *although not strictly required*, it would have been prudent to provide the coating. . . .
>
> Q.: [On cross-examination] And you would have put one on in 1977, as part of the specifications . . . ?
>
> A.: *Not absolutely. I think that it is not a clear-cut decision as to whether to do it or not.*

(V. 37 at 5559-60, 5923) (emphasis added).

The County-authored final judgment extensively relies on Mr. Edmunds' expert opinions on virtually every aspect of the design and manufacture of the pipe segments used in this pipeline. (R. at pp. 4008, 4010-18, 4020-22, 4030-34, 4038-39, 4043-45, 4047-52, 4059-60). It conveniently ignores his testimony on this point, however, in favor of the testimony of one of the

County's other experts, Robert Price. (R. at 4117). Mr. Edmunds felt that the existence of carbon dioxide in the groundwater did not require epoxy coating; Mr. Price was of the opinion that it did. (V. 37 at 5560; V. 71 at 10446). Mr. Edmunds felt it was essential to have both a low soil Ph and a total high acidity to have an aggressive environment which would require epoxy coating; Price disagreed. (V. 41 at 6179; V. 73 at 10758-759). Mr. Edmunds testified that Hill did not fall below the standard of care in failing to recommend epoxy coating in 1977; Mr. Price again disagreed. (V. 41 at 6181-82; V. 43 at 6553-85; V. 71 at 10445-448). Although Edmunds and Price were in lockstep on virtually every aspect of the design and manufacture of the component parts of this pipeline, they could not agree that there was an obligation to coat this pipeline in the first instance. Patently, the County failed to establish with any degree of certainty that the applicable standard of care in 1975 required such a coating.

Even if Hill should have specified an epoxy coating, it cannot be held responsible for paying what would have been the owner's cost had there been no breach in the first place. *See Sea Air Towers, Ltd.*, 513 So.2d at 686, in which an architect and engineers were held to have no liability for the upgrade of a condominium garage deck because the financial responsibility for increasing the load capacity would have fallen on the owners irrespective of any negligence by the architect and engineers. *See also Lochrane Engineering, Inc.*, 552 So.2d at 228. Here, as in *Sea Air Towers, Ltd.*, the cost of upgrading (to epoxy coating) would have belonged to the County, irrespective of any

breach. Had Hill specified an epoxy coating in 1977, the County would have paid for it, not Hill.

The final judgment casts responsibility on Hill to pay the additional costs of coating its new pipeline -- the alleged difference between the cost of coating the original pipeline estimated as of 1977 ($1,596,232) and the current cost of coating a new pipeline ($2,379,620) (R. at 4159-60; V. 206 at 26627). This award is nonsensical. The County never spent $1,596,232 to coat the original pipeline. Since it had the use and benefit of that money since 1977, Hill is entitled to offset this saving (rather than being required to foot any increase in cost). At statutory interest rates, the County benefit (based on its estimates) was $1,768,275-19. At the conservative rate of 6%, the County benefitted by $1,007,839.99. Since both amounts exceed the $783,388 "additional cost" to coat the pipe, the County was entitled to no award to epoxy coat its new pipeline. 22 Am. Jur. 2d *Damages* ¶ 552 (1988).

For the same reasons, there is no legitimate basis to award $664,444 against Hill for design of the new pipeline. (R. at 4161; V. 206 at 26627). This amount was derived by recalculating the original design and consulting costs ($365,000) to present dollar value. (V. 86 at 12897-900). As there was no showing that the design provided by Hill in 1977 was wholly inadequate, there is no support for requiring Hill to reimburse the County every single cent Hill was paid for designing the pipeline in 1977 ($365,000) at the current value of that money ($664,444). The County got what it bargained for, and it is not now entitled to have Hill reimburse its original design fee ($365,000) at current or any other rates.

These two betterment awards, totalling $1,447,832, are factually and legally unsupportable. They reflect an overreaching which only an advocate-drafted final judgment would present.[41/]

Conclusion

It is regrettable that a trial of this length must be set aside for judicial misconduct. The rules of law unmistakably require that result, however. Judge Bryson's demonstrated bias in favor of the County and against Hill (both directly and through its counsel), aggravated by his conduct after being presented with the motion to disqualify, leave no room to salvage this protracted bench trial.

Even if there had been no disqualifying conduct by the presiding judge, however, the judgment entered by the trial court cannot be sustained. The County-crafted final judgment is premised on (i) liability for torts which were neither pled nor proved, (ii) liability for breaches of one contract to which Hill was not a party and another which was fully performed within the realm of services contracted for, and (iii) damage awards which are wildly speculative and without legal foundation. Judge Bryson's entry of the extraordinary final judgment submitted by the County departs so dramatically from the established legal principles in Florida that the only plausible explanation for its entry is the trial court's predilection to give the County everything it requested.

41/ *See Waldman v. Waldman*, 520 So.2d 87, 88 n.4. (Fla. 3d DCA), *rev. denied*, 531 So.2d 169 (Fla.1988).

The court is respectfully requested to vacate the final judgment as being unsupported in law or in fact, and to remand this case with directions to enter judgment for Hill. Were the court to conclude otherwise, at a minimum a new trial must be ordered before a judge other than Judge Bryson.

Respectfully submitted,

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Certificate of Service

I certify that a correct copy of appellant's initial brief and appendix initially were mailed on March 25, 1991; copies containing record citations subsequently mailed on April 8, 1991, to John T. Allen, Jr., Esq., 4508 Central Avenue, St. Petersburg, Florida 33711; to Michael J. Keane, Esq., Baynard, Harrell, Mascara & Ostow, P.A., 696 First Avenue North, Suite 303, St. Petersburg, Florida 33701; to Stephen Bull, Esq., Bull &

Haggard, 111 N. Orange Avenue, Suite 1200, Orlando, Florida 32801; and to Jeffrey S. O'Brien, Esq., Masterson, Rogers, Patterson, Masterson, O'Brien & Lopez, 696 First Avenue North, St. Petersburg, Florida 33701; and to G. Lee Garrett, Jr., Esq., Stephen O. Kinnard, Esq., Jones, Day, Reavis, & Pogue, 3300 First Atlanta Tower, Atlanta, Georgia 30383-3101.

/S/

APPENDIX 3

DISTRICT COURT OF APPEAL,
STATE OF FLORIDA
SECOND DISTRICT

On Appeal from the Sixth
Judicial Circuit, for
Pinellas County, Florida

Case Nos.
90-02027
90-02028
(Consolidated)

MADISON MANAGEMENT GROUP, INC.
and CH2M HILL SOUTHEAST, INC.,

Appellants,

v.

PINELLAS COUNTY, FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING, REHEARING EN BANC, OR CERTIFICATION, AND FOR CLARIFICATION

Pursuant to Florida Rules of Appellate Procedure 9.330 and 9.331, appellee Pinellas County,

Florida, moves for rehearing, rehearing en banc, and clarification of the decision filed March 13, 1992. Alternatively, the County moves for certification of the question identified below to the Florida Supreme Court as being of exceptional public importance. The panel's decision that the County cannot sue its consulting engineer in tort growing out of its contact conflicts with scores of Florida decisions allowing clients to sue their professionals for negligent performance of contractually agreed upon services. Hence, this decision is not only of great significance to the County and its residents, as the panel expressly recognized (Op. 4), it will have an acute impact on this state's law governing professional malpractice claims.

Introduction

1. This case arises from the design and manufacture of the County's water pipeline, which first ruptured in 1979. The non-jury trial of the County's claims against the pipeline's engineer and manufacturer began in January 1989. In October of that year, both defendants moved to disqualify the trial judge on grounds of bias, but the judge denied the motions and proceeded with the case. After a year-long trial, the court entered judgment in favor of Pinellas County on the County's contract wand tort claims CH2M Hill Southeast, Inc., successor to the engineer for the pipeline, Black, Crow & Eidsness, Inc. ("Hill" or the "Engineer"), and against Madison Management Group, Inc., successor to the manufacturer of the pipe ("Interpace").

2. The panel reversed, holding that the trial judge's failure to withdraw from the case was error, and remanded the case for a new trial. Although the panel left all issues open for re-trial as against Interpace, it resolved two issues as to the Engineer on their merits. First, the panel held that the County had no tort claim against its professional engineer for negligent performance of the contractually agreed upon services. Second, the panel held that the County is limited on re-trial solely to a claim that the Engineer breached its direct contract with the County by allowing the use of Class IV wire. It is upon these issues that Pinellas County seeks rehearing, rehearing en banc, clarification, or, in the alternative, certification as a question of exceptional public importance.

Rehearing, Rehearing En Banc, or Certification
As to Tort Claims Against the Engineer

3. The panel held that the County's negligence claim against the Engineer was barred as a matter of law. The panel stated:

> To have an actionable tort claim in a breach of contract case, there must be appropriate pleadings and proof of conduct resulting in personal injury or property damage beyond the breach of the contract.

(Op. 6-7) (citing *J. Allen, Inc. v. Humana of Florida, Inc.*, 571 So. 2d 565 (Fla. 2nd DCA 1990)). The panel concluded that the County "failed to plead an independent tort separate from its breach of contract

claim against Hill" because the complaint "characterized Hill's 'negligence' in the performance of the contract as in fact constituting the breach of contract." (*Id.* 7).

4. In relying upon that general rule, the panel completely overlooked or misapprehended the County's allegation that Hill is a professional (Amended Complaint ¶ 64) and the settled case law which establishes that *special* rules apply to *professional* negligence claims growing out of the parties' contract for professional services. The panel's holding that judgment must be entered as a matter of law on the County's claim against the Engineer for its negligence in performing its professional duties under its contract with the County directly conflicts with controlling Florida precedent and with this Court's own decisions that privity of contract is an *essential* element of -- *not* a bar to -- a professional negligence claim in Florida. Thus, in *Angel, Cohen & Rogevin v. Oberon Investment, N.V.*, 512 So. 2d 192, 194 (Fla. 1987), cited and followed by this Court in *Nickolauson v. Rhyne*, 529 So. 2d 365, 366 (Fla. 2d DCA 1988), the Florida Supreme Court held that attorneys' liability for "*negligence in the performance of their professional duties*" is *limited* to "clients with whom they share *privity of contract*." (Emphasis supplied). As recently as its decision in *Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc.*, 581 So. 2d 1301, 1303 (Fla. 1991), the Supreme Court held that a professional's contractual privity with its client *created* a duty in tort toward that client:

> Clearly, privity between the parties may create a duty of care providing the basis

for recovery *in negligence*. (Emphasis supplied).

The panel's holding that the County cannot sue its consulting engineer for the negligent performance of the contractually agreed upon professional services turns these decisions on their head and makes the very existence of the contract a legal bar to a professional implicitly warrants as part of his contract that he will use due care in performing the agreed upon services, *Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507, 509 (1918), a client would -- under the *panel's* opinion -- *always* be foreclosed from suing his professional negligence. But that is directly contrary to the wealth of Florida decisions which have allowed tort claims by clients where their professional failed to use due care in performing the contracted for services.

5. In light of Florida's requirement of privity of contract as a pre-condition to a professional negligence claim, it is clear why the County's pleadings were framed as they were. Indeed, the County's allegations closely paralleled those in *Bayshore Development Co.*, 78 So. at 508-10, where the plaintiff alleged that it had contracted with the architect to prepare building plans and then alleged the "negligent failure to use skill and care on defendants' part in the making and execution of the plans . . . ." *Id.* at 508. The Supreme Court expressly *upheld* that cause of action as one "*in tort growing out of a contract*." *Id.* (Emphasis supplied).

The County's professional negligence claim is equally valid as one "in tort growing out of a contract," and the panel's extraordinary and unprecedented

holding that the client must instead allege negligent conduct by his professional that is "separate" and "independent" of the conduct constituting the breach of the professional's contract directly conflicts with the cited decisions. This creates an issue of exceptional importance to the public which contracts for professional services. The Court should grant rehearing en banc on this point if rehearing is not otherwise granted or, in the alternative, certify the following question to the Florida Supreme Court:

> Whether a client is barred from suing a professional for negligence which also constitutes a breach of the parties' contract for those professional services.

Rehearing, Rehearing En Banc, or Certification As to Contract Claims Against the Engineer

6. The Engineer prepared the contract between the County and Interpace by which Interpace agreed to manufacture the pipe to the Engineer's specifications. That contract expressly provided that Hill's predecessor, Black, Crow & Eidsness, Inc. -- *by name* -- would have certain specified responsibilities in connection with Interpace's manufacture of the pipe. The evidence at trial established that the Engineer subsequently undertook to perform duties specified in the Interpace contract but did not perform them properly.

7. The panel, after reversing on the disqualification issue and remanding for a new trial, concluded that no liability could be imposed on the

Engineer with respect to obligations under the Interpace contract because it was not a party or signatory to that contract. As the panel put it:

> It remains the rule in Florida that ordinarily a contract cannot bind one who is not a party thereto *or has not in some fashion agreed to accept its terms.*

(Op. 8) (emphasis supplied).

Having articulated the rule to be applied to the facts, the panel overlooked or misapprehended the ample evidence in this record from which a trier of fact could find that the Engineer had "in some fashion agreed to accept" the terms of the Interpace contract, thus making this an issue of fact to be resolved on re-trial. For example, there was evidence that the Engineer prepared the County's contract with Interpace and that this contract expressly imposed obligations on *Hill*, "acting for" the County, regarding approval of materials, certification of invoices for payment, inspection of shop drawings, and various other aspects of the pipe manufacture. Moreover, there is considerable evidence in this record regarding Hills' subsequent undertaking of responsibilities specified for Hill in the County's contract with Interpace, and this further demonstrated a manifestation of the Engineer's agreement to accept the terms of the Interpace contract.

In light of this evidence, the rule enunciated in the panel's opinion cannot be applied in this case as a matter of law. Rather, there must a factual determination whether these and other acts established in this record demonstrate that the Engineer had "in

some fashion agreed" to perform the duties it had specified for Hill in the Interpace contract. The panel focuses on certain factors which could lead the trier of fact to find there was no such agreement, but the panel completely overlooks *other*, critical facts -- including the Engineer's drafting of the Interpace contract, a fact *nowhere* mentioned in the panel's opinion -- which could certainly lead a trier of fact to the opposite conclusion. Hence, rehearing should be granted and the panel's opinion clarified to allow the County to present evidence on re-trial in support of its claim that the Engineer agreed to accept, and then undertook to perform, the responsibilities it expressly imposed upon itself, by name, as the County's representative under the Interpace contract.

8. Even apart from this, the Interpace contract cannot be held as a matter of law to be irrelevant to a determination of the Engineer's contractual duties to the County. The panel overlooked the settled principle that the construction of a contract as a matter of law -- as the panel's opinion undertakes to do -- is only appropriate where the contract's language is unambiguous. *See, e.g., Neumann v. Brigman*, 475 So. 2d 1247, 1249 (Fla. 2d DCA 1985); *Courtney v. R.L. Schmeckpeper, Inc.*, 442 So. 2d 294, 296 (Fla. 2d DCA 1983).

The panel does not, and could not conclude that the Engineer's contract with the County was unambiguous. For example, the term "construction," a term used throughout the Engineer's contract with the County, is nowhere defined in that contract and it is undeniably subject to two completely different interpretations by the parties. Thus, although the

Engineer contended at trial that "construction" as sued in its contract with the County referred only to *installation* of the pipe, when it came to calculating the amount of money it should receive under Item F of that same contract for progress payments based on "construction cost," it is undisputed that the Engineer included the full cost of the *manufacture* of the pipe! (R. 9051-55). This alone creates an ambiguity on the face of the Engineer's contract with the County.

In light of that ambiguity, it was entirely appropriate for the trier of fact to look to extrinsic evidence -- including the Interpace contract, in which the Engineer had expressly defined the term "construction" as having precisely the meaning the County had understood it to have in the Engineer's contract with the County -- to construe the contract. *Friedman v. Virginia Metal Products Corp.*, 56 So. 2d 515, 516 (Fla. 1952) (given two reasonable constructions, contract could not be interpreted without reference to the circumstances surrounding it); *Bunnell Medical Clinic, P.A. v. Barrera*, 419 So. 2d 681, 683 (Fla. 3d DCA 1982) (latent ambiguities in contract rendered parol evidence admissible); *see Dickerson Construction Co. v. Process Engineering Co.*, 341 So. 2d 646, 650-51 (Miss. 1977) (contract between owner and contractor -- drafted by engineer -- relevant to resolving ambiguity in engineer's contract with owner). Hence, the construction of the Engineer's contractual duties constitutes an issue of fact to be resolved in the re-trial of this case. The panel, however, overlooking this limitation on the scope of appellate review, undertook to construe the Engineer's contract with the County as a matter of law.

Rehearing or Clarification as to Re-Trial of County's Contract Claims Against the Engineer

9. The panel concluded that the Engineer was entitled to judgment as a matter of law on "all" the County's contract claims but one -- whether the Engineer breached its contract with the County by allowing the pipe manufacturer to sue Class IV wire. Given the length of the trial proceedings, the enormous size of the record on appeal (262 volumes), and the complexity of these highly technical issues (all of which are acknowledged by the panel at pages 3-4 of its decision), it is not surprising that the panel overlooked or failed to apprehend the force and effect of the evidence establishing the Engineer's breaches of *other* duties expressly imposed under its direct contract with the County. Indeed, many of the trial court's findings of those additional breaches were *not even appealed* by the Engineer, and hence the voluminous evidence establishing those breaches was not focused on in the briefs or oral argument to the panel.

The County must be allowed on re-trial to pursue its claims of those other contractual breaches for precisely the same reason that the County is entitled to assert its contract claim against the Engineer for allowing the use of Class IV wire. The panel correctly recognized the Engineer's contractual obligation to review Interpace's submittal sheets with respect to the wire. But the panel overlooked or misapprehended the substantial competent evidence in the record that the Engineer's review of those submittals -- a review of the Engineer was admittedly required to and did make under Item A(6) of its contract *before* the County executed the construction contract with Interpace

(Compare Interpace contract dated February 25, 1977 with submittal sheets approved by Hill on February 7, 1977 (R. 19043, 9504-06)) -- failed to discover deficiencies *apart* from the Class IV wire deficiency. Among many other things, there was considerable evidence that the Engineer failed to properly check the design formulas set forth in Interpace's submittal sheets (from which it would have discovered that the pipe would not operate at the pressure specified by the Engineer). (R. 7460-61).

Furthermore, the record evidence establishes breaches by the Engineer of other obligations imposed under its direct contract with the County. For example, under Item A(1), the Engineer expressly agreed as a part of its "design" services to "[p]rovide consultation and advice as to the necessity of providing other services such as . . . laboratory testing and inspection of samples or materials . . ." and, in Item A(3), the Engineer agreed to (and it did) prepare the contract for the construction of the pipe. There is an issue of act whether, in order to properly perform those responsibilities, the Engineer should have included a provision in the Interpace contract requiring suitable testing of materials as suggested by the applicable national standards. An issue of fact is also presented regarding the Engineer's improper drafting of the Interpace contract to assign such duties to itself as the County's representative if, unbeknownst to the County, Hill did not intend to accept responsibility for those duties. Hill cannot have it *both* ways.

In addition, there was overwhelming evidence in this record that the Engineer improperly designed the pipeline in the first instance. In particular, it failed to

specify in its design a proper protective coating for the pipeline, in violation of Items A(1) and A(2). (R. 10445-46. 10450). It also failed to properly design placement of relief valves, in violation of Item A(2). (R. 5180-83; 6148-49).

In short, the panel's ruling that only one alleged breach -- Class IV wire -- is left in the County's contract claim against the Engineer overlooks numerous other breaches of the obligations the Engineer expressly assumed in its contract. The panel's opinion should be clarified to make plain that the County may on re-trial pursue all of its claims of breaches of the Engineer's direct contract with the County.

Required Statement for Rehearing en Banc

Pursuant to the requirements of the Florida Rules of Appellate Procedure 9.331(c)(2), we express a belief, based on a reasoned and studied professional judgment, that the panel decision is one of exceptional importance and, further, that the panel's decision is contrary to the following decisions of this Court and that a consideration by the full court is necessary t maintain uniformity of decisions in this Court. *Nickolauson v. Rhyne*, 529 So. 2d 365 (Fla. 2d DCA 1988); *Newman v. Brigman*, 475 So. 2d 1247 (Fla. 2d DCA 1985); *Courtney v. R.L. Schmeckpeper, Inc.*, 442 So. 2d 294. (Fla. 2d DCA 1983).

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APPENDIX 4

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

MAY 19, 1992

Case No. 90-02027
90-02028

CH2M HILL SOUTHEAST, INC.,

Appellant,

v.

PINELLAS COUNTY, FLORIDA,

Appellee.

_____/

BY ORDER OF THE COURT:

Counsel for appellee having filed a motion for rehearing, rehearing en banc or certification and for clarification in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

(Signed)

WILLIAM A. HADDAD, Clerk

c: Stephen M. Bull, Esq.
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APPENDIX 5

SUPREME COURT OF FLORIDA

CASE NO. 80,056

MONDAY, OCTOBER 1, 1992

DISTRICT COURT OF APPEAL
2ND DISTRICT NO. 90-02027
90-02028, 90-03562, 90-03563

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,
ET AL.,

Respondents.
_____/

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, GRIMES KOGAN AND HARDING, JJ., concur

A True Copy

ATTEST:

(Sealed)

Sid J. White
Clerk of the Court

cc: Hon. William A. Haddad, Clerk
Hon. Karleen F. DeBlaker, Clerk
Hon. Fred. L. Bryson, Judge
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APPENDIX 6

IN THE CIRCUIT COURT FOR
PINELLAS COUNTY, FLORIDA

CIRCUIT CIVIL NO. 83-13313-07

PINELLAS COUNTY, etc.,

Plaintiff,

v.

INTERPACE, etc., et al.,

Defendants.

_____/

PROCEEDINGS:	Request for Clarification.
BEFORE:	Hon. Howard Rives, Judge of the Circuit Court.
DATE:	March 3, 1993.
PLACE:	Judicial Building, St. Petersburg, Florida.
REPORTED BY:	Donald Kanabay, C.M., Official Court Reporter.

KANABAY & KANABAY
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THE COURT: Good morning. I want to apologize to everyone here for not keeping the appointment the other day, but I had a cold and I still have it, unfortunately. Mr. Allen, have you and Mr. Hill discussed the order that you want to proceed on this morning?

MR. ALLEN: No, we haven't, your Honor. As far as which one would be taken up first.

MR. HILL: The one thing we did decide, Judge, was that there are apparently three cases set for consideration before your Honor today: what we call the 60-inch case -- the Pinellas County case -- the West Coast case, and then the CDM case -- and I think we agreed, because of time constraints, to go ahead and start with the 60-inch case.

MR. ALLEN: That's correct. He needs to leave by twelve o'clock.

MR. HILL: Right.

THE COURT: All right. We'll accommodate your schedule, Mr. Hill.

MR. HILL: And we're prepared -- I mean, other people will stay and take care of CH2M Hill --

THE COURT: We have today set side [sic] for you.

MR. HILL: Yes, sir.

MR. ALLEN: Judge, also, we have resolved whatever issues that were pending in the CDM case with Mr. Smith, so we don't have to bother your Honor with that particular matter today. There were discovery matters and things of that kind, which --

THE COURT: Is that the one about whether or not Mr. Price's deposition and the costs of that --

MR. ALLEN: No, sir, that's still going to be, I guess, vigorously argued here. I think that one's still alive. But that comes from the 84-inch case, Judge, rather than the Cross Bar case.

THE COURT: Well, let's see if we can resolve the 60-inch case first. And just let me say, gentlemen, that I have a copy of the Mandate from the Second District in front of me, and I also have a copy of the Opinion, and I'm just as eager as you are to determine what the issues are, and the procedures. My clerks were also kind enough to make a copy of the ALR annotation -- I think I gave you folks the wrong cite -- it was 9 ALR 4 1041 is the article that I had reference to about the annotation relating to jury trials. I think that page 8 or section 8 of that particular article pertains to the various subject matter that we will have at had on this case at some point.

MR. HILL: Your Honor, if I might, I don't know what the logical way is to start, with respect to the 60-inch case, but you said you have the mandate in front of you?

THE COURT: Yes, sir.

MR. HILL: One of the things that the Mandate, read with the Opinion, says, is that the Court will enter a Judgment in favor of CH2M Hill on all issues save one. With that in mind, I prepared and have given to Mr. Allen and Mr. Keane a copy of a proposed final partial judgment which would be consistent with the Mandate.

MR. KEANE: Are you reading from the Mandate, you say?

THE COURT: No, it's in the Opinion.

MR. HILL: It's in the Opinion. Page 88 of the Opinion says, we hold further that Hill is entitled to judgment as a matter of law on all issues save one, and the new trial as to Hill shall be limited to the one issue dealt with below.

So what we've done is just track that language in our proposed Final Judgment, your Honor, and submit that to you for your consideration.

THE COURT: Well, looking at page 6 of the Opinion, if you have it -- the Court's own Opinion,

* * *

helpful to have that in front of you. That's the CH2M Hill contract which is the subject of this case.

MR. HILL: If your Honor wants me to respond now, I can, because I think it's rather simple as to all of this.

THE COURT: I just wondered how -- I don't want to break into Mr. Keane's planned arguments, but --

MR. HILL: Well, if he'd like to finish his argument --

THE COURT: Let him conclude, and then we'll see.

MR. KEANE: This may be a little bit -- the issue is squarely raised by their proposed final partial judgment. What they would like you to sign, your Honor, they want you to say that the only thing we get to plead and proceed on at trial is the one breach of the contract by CH2M Hill, namely, allowing the pipe manufacturer to use class 4 wire. And if you don't read the Opinion carefully enough, it would seem to say just that. But you have to look at the entire Opinion and the law of the State of Florida to know exactly where we stand, and this is where I believe we stand.

If you look at the brief that was filed by CH2M Hill, they never appealed several of the issues that we raised as breaches of the contract. They just simply never gave the Second District Court of Appeal the opportunity to even address the issues. For example, if you look at page 40 of the Complaint, we complained that CH2M Hill failed to specify or to have performed sufficient inspection and testing of materials used in the manufacture of the pipe to ensure the pipe would be manufactured and delivered as required by the specifications. Sub (E) on that page, we complained that CH2M Hill failed to certify completion of the project, which they were required by their

contract to do. Turning to page 42, (H) complained that they failed to specify acceptance inspection procedures adequate to identify defective pipe, and it goes on in some detail. They failed to identify incorrect pipe loading and unloading techniques; failed to require Interpace to provide samples and specimens of pipe. Well, if you look at the CH2M Hill contract, that's exactly the category and class of activities they contracted with Pinellas County to do. Judge Bryson, in his Final Judgment, found violations of each of these things, and CH2M Hill never appealed those issues.

And of course, if you go back to what did the Second District do, the first thing the Second District did was they wiped out the judgment, because they said the Judge was biased or should have stepped down. Once having done that, we're back as though that case was never tried, and consequently the only issues that the District court could dispose of were not issues that were fact dependent, where there was an issue of fact to be tried, as to whether there was or was not a breach of the CH2M Hill contract; the only thing they could do was look at the documents and determine whether, as a matter of law, certain duties existed or didn't. And in fact, they found one of those issues for CH2M Hill, when they found that they could not find among the documents an affirmative duty to go to the plant. That's in there, and we disagree with their reading of that, but that's what they found as a matter of law.

The next thing that they did was they found there was no ability to merge the two contracts together. You could not -- even though CH2M Hill was written on the fact of the Interpace contract, they

defined themselves as the engineers, they actually undertook to do all of the things in the Interpace contract -- somehow the Second District came down and landed on the thing and determined that CH2M Hill, even though they drew that contract as a contract document, didn't pick up any of the duties they defined for themselves.

Frankly, it's a preposterous Opinion, it absolutely flies in the face of everything that we know about construction documentation, but that's what they have done. So they decided those two issues as a matter of law. But what they could not and did not do was decide anything that had to be determined by a finding of fact, because they couldn't. There were no summary judgment proceedings available, there were no summary judgment orders that were made the subject of the appeal. Instead, what these folks now would like to have you do by their final partial judgment is gut the entire contract action. Every one of these things are dependent on a trial and a finding by the trier of fact as to whether, regarding Paragraph 1, under item (A), design of improvement -- that's at page 3 of the contract -- we complained that they did not properly provide consultation regarding laboratory testing, inspection of samples or materials, special consultation or act as the owner's representative in connection with those services. That's what they were required to do.

They never appealed that issue on page 3. The next thing they were supposed to do, so that . . .

APPENDIX 7

IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 93-01203

PINELLAS COUNTY,

Appellant,

v.

CH2M HILL SOUTHEAST, INC.,

Appellee.

_____/

APPELLEE'S ANSWER BRIEF

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Introduction

This appeal brings to the court the question of whether the court meant what it said in 1992 when it wrote in the prior appeal of this case:

> We hold further that Hill is entitled to judgment as a matter of law *on all issues save one*, and the new trial as to Hill shall be limited to the one issue [of breach of contractual design responsibility by allowing the use of class IV wire for the pipeline] dealt with below. (Emphasis added).

CH2M Hill Southeast, Inc. v. Pinellas County, 598 So. 2d 85, 88 (Fla. 2d DCA), *rev. denied*, 613 So. 2d 7 (Fla. 1992) ("*Hill I*"). The trial court has entered an order which takes this court at its word, ruling by way of partial summary judgment that Pinellas County (the "County") is precluded from litigating anew all issues which this court resolved as a matter of law against the County.

CH2M Hill Southeast Inc. ("Hill") will demonstrate that the County is seeking to circumvent "law of the case" as established in *Hill I*, and endeavoring one more time to find liability against Hill where none can lawfully be found. That demonstration will show that the multiplicity of proposed issues which the County has presented to the court are in fact repackaged merchandise -- issues this court has already reviewed and found legally unavailable against Hill -- and that the trial court was correct in barring the County from reasserting those rejected legal theories.

Statement of the Case and Facts

The *Hill I* decision followed a non-jury trial in which the County sued Hill, with whose predecessor (Black, Crow & Eidsness, Inc.) it had contracted for the design of 13.5 miles of pipeline, for alleged negligence and breach of contract (V. 8 at 972-80).[1/] More counts were included in the action against the manufacturer of the pipe, Interpace, Inc. (now known as Madison Management Group, Inc.), including charges of negligence, breach of contract, breach of warranty, strict liability and fraud. (V. 8 at 960-72). In its First Amended Complaint, the County alleged that Hill was responsible for the manufacturer's production of defective pipe, based on alleged manufacturing oversight and other obligations. (PR. 40-47). Madison Manufacturing Group, Inc. participated in the *Hill I* appeal, but is now in bankruptcy. The County is presently pursuing a second trial only against Hill.

1/ References will be made in this brief by designation to the consolidated record of *Hill I* and this appeal. Volume references (V. at ___) will follow factual references to the *Hill I* record. Record references (PR. ___) correspond to the "post-mandate" record compiled for this appeal. Additionally, many references are included to the briefs of the parties in *Hill I* and, as well, to the motion for rehearing and clarification filed by the County in *Hill I*. A separate appendix accompanying this brief includes the County's Answer brief in *Hill I*, Hill's Reply brief in *Hill I*, and, a complete copy of the County's motion for rehearing and clarification in *Hill I*. The *Hill I* Initial brief is already included in the post-mandate record. (PR. 70-151).

The County has made an issue of what this court did and did not consider in its *Hill I* decision. Yet, the County has not provided in its Statement all information relevant to that inquiry. Consequently, Hill provides this Statement in order to round out the court's understanding and recollection of *Hill I*.

In *Hill I*, the panel had before it a controversy encapsulated in a trial transcript of 14,000 pages, a record on appeal of 265 volumes, a record index of 437 pages and a final judgment of 200 pages, all reflecting trial court activities from a one-year trial. In that appeal, Hill raised multiple issues and arguments, ranging from disqualification of the trial judge to the legal soundness of tort claims, contract claims and damage claims.

In deciding that prior appeal, the court determined as a first matter that the trial judge should have disqualified himself based on instances of judicial misconduct during the trial. The court's review of the case went beyond just that issue, however, based on the extensive briefings by the parties and the availability of exhaustive appendices. The court was presented on appeal with a multiplicity of issues, including the impropriety of any tort claim against Hill, the invalidity of the County's theory of merging unrelated contracts, and the County's contention that Hill had duties (contractually, in tort and statutorily) beyond those which it contracted for, such as overseeing the pipe segment manufacturing process.[2/] The court considered the range of issues presented, and affirmatively addressed them. The court had to,

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2/ Initial Br. in *Hill I* at 35-60.

because the legal posture of the case, the court found, had been framed by the manner in which the County chose to write its complaint against Hill.

The County alleged a host of tort claims against Hill in 22 detailed subparagraphs lodged in paragraph 66 of its Count IX. (PR. 40-47). The County then pled its breach of contract claims against Hill in one short sentence, denominated as Count X, which did nothing more than incorporate by reference the *tort* allegations in paragraph 66. (PR. 47). In so doing, the County treated alleged acts of contract breach by Hill as identical with and indistinguishable from the acts which the County claimed were tortious.[3/] Based on the County's trial-framing complaint and the 200-page, 1,164 footnote final judgment which the County had drafted and the trial judge signed without so much as a comma being changed, *all* contract breach allegations were brought under scrutiny by the court when Hill challenged and the court passed on the legal issues presented.

The briefs, appendices and motions of the parties in *Hill I* reveal what was before the court. Hill's initial brief, of course, was the starting point.[4/] In response to Hill's initial briefing, which included contract as well as tort issues, the County's copious answer brief asserted that a "merger" theory bound Hill to perform covenants of Interpace's (the pipe manufacturer's)

3/ *See Hill I*, 598 So. 2d at 88.

4/ The County acknowledges that Hill's initial brief is a foundation for determining what was presented in *Hill I*. County's Initial Br. at 8.

contract with the County.[5] It also urged the court to conclude, as had the trial court, that Hill had a contractual responsibility to oversee the manufacture of pipe segments under both the Hill and Interpace contracts.[6] In essence, the County defended its amalgam of tort and contract duties, based on the preeminence of tort duties in its complaint and the trial court's findings of both tort and contract breaches in the final judgment.[7]

The court expressly rejected the County's merger theory, meaning that Hill was not bound to perform any terms of the Interpace contract with the County.[8] The court expressly rejected the assertion that Hill had a manufacturing process oversight duty,[9] based on the terms of the authorized sections of Hill's contract and in response to Hill's uncontroverted contention that *the County* had assumed resident engineer/general contractor status as to all Item C services specified in the County's contract with Hill. The court also expressly rejected, without labeling them, all other alleged contract and non-contract duties which the County had sought to impose, "save one."[10] The court held that only Hill's approval of class IV wire in

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5/ County answer brief in *Hill I* at 17-24.

6/ *Id.* at 15, 19-21.

7/ *Id.* at 15-40.

8/ *Hill I*, 598 So. 2d at 89.

9/ *Hill I*, 598 So. 2d at 88-89.

10/ *Id.* at 88.

the design criteria was an appropriate fact issue to be considered on retrial.[11/]

The County filed a detailed motion for rehearing and clarification, in which it devoted lengthy sections to the court's purported misapprehensions concerning alleged breaches of the Hill contract. (PR. 158).[12/] The court denied rehearing. (PR. 163). The County next sought review of the court's decision by the Florida Supreme Court. That request for review was denied. (PR. 164).

Following the court's decision and issuance of the mandate in *Hill I*, remand proceedings commenced in the circuit court based on the County's unamended First Amended Complaint (the "complaint"). In pretrial proceedings, the County requested clarification as to the issues available for retrial and Hill responded by presenting the circuit court with this court's *Hill I* decision and mandate. (PR. 238-240). The trial court received written memoranda from the County and Hill, and it heard argument before entering the order now brought for review -- an order adhering precisely to the mandate of this court and leaving for retrial the sole issue of Hill's alleged contract breach concerning class IV wire. (PR. 243).

The County filed an appeal from the order (PR. 295-298), and, alternatively, a petition for writ of certiorari. Hill moved to dismiss the appeal. The

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11/ *Id.* at 89.

12/ County's Motion for Rehearing, etc., in *Hill I* at 9-12.

certiorari petition was dismissed by the court, and Hill's motion to dismiss was denied.

At the County's request, the record on appeal comprises the enormous record compiled from the first appeal in *Hill I*, plus materials from below that were compiled since the mandate was issued, including Hill's initial brief in *Hill I* and the County's motion for rehearing and clarification in *Hill I*. The court, of course, may in any event take judicial notice from its own files of all the briefs and motions filed in *Hill I*. *Department of Legal Affairs v. District Court of Appeal, Fifth District*, 434 So. 2d 310, 313 (Fla. 1983); *Barry Hinnant, Inc. v. Spottswood*, 481 So. 2d 80, 81 (Fla. 1st DCA 1986).

Summary of Argument

Upon being presented on reversal with the *Hill I* decision and the court's mandate, the trial court entered an order which tracked exactly the limitations on retrial which this court had directed. Rejection of the County's request to expand the number of triable issues beyond class IV wire was the only course open to the trial court. The trial court did not err, abuse its discretion or deviate from the mandate in following the directions of this court on remand.

The issues which the County seeks to have retried other than class IV wire are barred by the doctrine of "law of the case." In the prior appeal, the court considered and rejected each of the issues now pressed on the trial court for retrial. The County's election to treat alleged contract breaches as identical

with and subsidiary to alleged torts required the court to evaluate and analyze each contract breach alleged in the County's First Amended Complaint. Each of those issues was extensively briefed, argued and given independent appellate review. The contract claims now being presented were reviewed again on the basis of the County's motion for rehearing and clarification of the court's decision in *Hill I*. In short, the County has had its day in court on all contract issues, and the court was fully informed when it held that all issues other than class IV wire had been considered and resolved.

The County has made clear that its dissatisfaction lies directly in what the *Hill I* decision did, not what was omitted. The County described the *Hill I* decision to the trial court as "preposterous." For all intents and purposes, the County is seeking reconsideration of the *Hill I* decision. The time for rehearing has long expired, however, and the County has no right to a rehearing on the County's prior denial of rehearing.

Argument

There are three independent reasons why the trial court's Final Partial Judgment should be affirmed. First, the trial court precisely followed the opinion of this court in *Hill I* and the court's subsequent mandate, as it should have. *State Farm Mut. Auto. Ins. Co. v. Stack*, 543 So. 2d 782 (Fla. 3d DCA 1989); *Patten v. State*, 531 So. 2d 203 (Fla. 2d DCA 1988). The County's suggestion that the trial court departed from the court's earlier directive is completely mistaken.

Second, the issues sought to be retried by the County were legally challenged by Hill in the first appeal, were fully considered by the court, and were disposed of. Under the doctrine known as "law of the case," they are not subject to being revived anew. Third, the County's arguments are in any event not really directed to action taken by the trial court or any omission of issues considered in *Hill I*. Rather, the County's grievance lies with the adverse decision which the County received in *Hill I*. That decision was rendered and became final on May 19, 1992. The County is belatedly, and improperly, seeking reconsideration of that decision.

1. The trial court faithfully and strictly adhered to the court's *Hill I* opinion and mandate.

There has been no departure from the opinion or mandate of this court such as to warrant a reversal of the trial court's Final Partial Judgment. The trial court could not have more faithfully followed this court's clear instructions. In *Hill I*, the court stated that Hill

> is entitled to judgment as a matter of law on all issues save one, and the new trial as to Hill shall be limited to the one issue dealt with below.

598 So. 2d at 88. That "issue" was identified in the *Hill I* decision as whether

> Hill had breached its contractual design responsibilities by allowing the pipe manufacturer to use class IV wire for the pipeline.

598 So. 2d at 89. Subsequently, the court issued a mandate which stated:

> YOU ARE HEREBY COMMANDED that further proceedings be had in said cause *in accordance with the opinion of this Court* . . . (emphasis supplied).

(R. 165). On return to the trial court, Hill moved for entry of judgment in accordance with this court's opinion and mandate, quoting from the express language just recited. (PR. 244-246). The Partial Final Judgment which is the subject of this appeal (PR. 243), tracks *exactly* both the language in *Hill I* and the directive to follow that language in the court's mandate. The trial court, obviously, did *not* depart from the court's prior action in the slightest.

2. Issues on remand other than breach of contract based on the use of Class IV wire are precluded by the *Hill I* decision.

The arguments presented by the County as to why it should be entitled to pursue claims which were adjudicated in the first appeal do not justify the court's retreat from its expressed limitation on re-triable issues in its *Hill I* decision. As will be shown, the County has merely repackaged its negligence claims and its borrowed duties from the Interpace contract into

"breach of contract duty" verbiage. It has done this by listing as potential contract breaches the sub-counts of the *negligence* allegations in its complaint.

To be more precise, the County has listed 42 specific, alleged breaches.[13/] The court cannot help note that this itemized list is taken in precise order from paragraph 66 of the County's First Amended Complaint -- the County's "negligence" count -- which the court in *Hill I* expressly ruled out of bounds for retrial. It's true, of course, that paragraph 70 of the County's complaint asserts a breach of contract by a wholesale incorporation by reference of paragraph 66. (PR. 47). That alone does not make negligence duties into contract duties, of course. That fact does, however, prove the point that the County in reality seeks again to have the court intermingle tort notions, Interpace contract provisions and its rejected merger theory, in the hope of having a second trial against Hill on its mishmash of proofs.

A careful comparison of the County's complaint and the contract which grounded the relationship between Hill and the County, together with a look at the appellate briefs and motions in *Hill I*, will show that the court reviewed all issues in full in considering the formulation of its *Hill I* decision, and that the County is simply craving the "second bite" here of the apple into which it improperly bit prior to the *Hill I* decision.

13/ County's Initial Br. at 15.

a. The County's First Amended Complaint.

A grasp of the issue on appeal requires a comparison of the County's amended complaint with the terms of its contract with Hill. After all, it is that comparative analysis which the County would indirectly have the court revisit. Yet, the County did not even attempt that comparison. Hill suggests the omission was a conscious one, for such an analysis leads inexorably to the conclusion that the court's *Hill I* decision was correct in foreclosing on retrial any issue other than an alleged breach of contract for allowing the use of class IV wire.

Beginning with Count IX on page 38 of the County's amended complaint, in numbered paragraph 63-66, the County asserts a tort theory of negligence against Hill. Paragraph 66 consists of 22 separate subparagraphs of allegedly negligent behavior. Those 22 subparagraph assertions are not available to the County on retrial, of course, having been declared in *Hill I* to be improper and unavailable.

The County's sole allegation of *contract* breach is contained in paragraph 70 of its amended complaint, which reads in its entirety:

> The Defendant, CH2M HILL SOUTHEAST, INC., breached its contract with the Plaintiff, PINELLAS COUNTY, in the manner described in Paragraph 66.

(PR. 47). That breach of contract allegation against Hill will seem familiar to the court, for that unadorned

allegation of contract breach was both identified and quoted in the *Hill I* decision,[14] where the court rejected the County's attempt to piggyback its tort and contract allegations as if they were interchangeable. There are dual lessons to be learned from the thoroughness and precision of the court's *Hill I* decision in this regard.

First, of course, tort claims which parallel contract claims are impermissible. The County concedes as much, as it must given the holding of the *Hill I* decision. Second, however, and more significantly for this appeal, the court in *Hill I* had before it each of the 42 allegations of misconduct (taken from paragraph 66 of the County's complaint) which the County now claims constituted Hill's breaches of contract. Substantively, the court mastered and spoke to the interplay between the precise allegations of the County's complaint and the alleged breaches of contract on which the County then purportedly travelled. It cannot be said that the court failed to consider the significance of its directive of remand for retrial on one issue alone. The court was clearly cogent and cognizant when it held in *Hill I* that Hill is entitled to judgment as a matter of law "on all issues save one . . . ."[15]

The problem that now plagues the County is the manner in which it chose to pursue Hill in its case-framing complaint -- its allegations of negligence with great precision and detail, followed by a one-sentence, wholesale incorporation by reference of any

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14/ 598 So. 2d at 88.

15/ *Id.*

hypothetical contract breach claims. The County's pleading stance never articulated contract breaches by Hill; it repeated *negligence* allegations, almost as an afterthought, and without contract-based particularity. That pleading choice is the very reason that prior action by this court, and the action taken by the trial court on remand, were predicated on a complete visitation to the County's contract claims.

b. The parties' briefings in *Hill I* focused on the Hill contract.

Were the court to compare the parties' briefs in *Hill I* with the multiple contract issues the County says were not addressed there, it would find that virtually every now-asserted contract claim was argued to the court previously. A sequential review of the briefing in *Hill I* makes that clear.

Hill endeavored in its initial brief to explain that the limitations of space obviated any opportunity to rebut one-by-one the recitals of breach found in the County-crafted final judgment, signed without modification by a judge who was prejudicially biased in favor of the County.[16/] Instead, Hill took on the two themes of contract breach which coursed their way through the County's amended complaint and dominated the County's trial presentation; namely, the "merger of contract" theory, and the manufacturing oversight theory.[17/] In pursuit of a bloated tort

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16/ *See* Initial Br. in *Hill I* at 1.

17/ *Id.* at 44-45.

recovery, the County had elected to entangle every one of its contract claims with these two strains. It did this in two ways.

First, the County merged the two contracts as if they were one, thereby trying its contract claims as if alleged breaches of the Interpace contract were in fact violations of the provisions of the Hill contract.[18/] Added to this puzzling process and fully sanctioned by the trial court, the County reached outside the Hill contract itself to assert as well that Hill was obligated to supervise, test and challenge the pipe segment manufacturing and installation process.[19/] These legal and factual embellishments on the actual contract relationship between Hill and the County were driven (as noted above) by its election to piggyback all alleged breaches of contract on a lengthy and detailed recitation of negligence duties.

In bringing to this court the County-crafted final judgment, Hill did the only thing possible. It focused the court's attention on Hill's contract with the County, with a specificity that the County had never been required to face in the first, faulted trial. Hill, of course, conceded at the outset of its initial brief that it would be impossible to trudge item by item through the misperceived and malformed contract breaches identified in the final judgment, given the sweeping theoretical and imprecise foundations on which it rested. So, Hill parsed the County's improper theories

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18/ *See* County's Answer Br. in *Hill I* at 16-24.

19/ *Id.* at 21-26.

against the contract itself and analyzed the so-called four, "Item" services Hill had contracted to provide.

First, Hill established that many of the alleged manufacturing oversight breaches claimed by the County were founded in Item A services in the Hill contract -- a section devoted to the design of the pathway for placement of the pipe and to the issuance of general specifications for the project improvements.[20/] Hill next identified Item B services -- those applied to installation of the pipe line and review of shop drawings.[21/] Hill noted in that context the express disclaimer in Item B for any materials testing services of the pipe segments, or otherwise.[22/] The validity of this express disclaimer, incidentally, was never challenged by the County. Instead, it sought to circumvent that disclaimer by the assertion of its "contract merger" theory.[23/]

Hill next explained, as the undisputed facts established and the County continually chose to ignore, that the County itself elected to perform the breadth of resident engineering and contractor services related to the installation phase of the project, and also performed

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20/ Initial Br. in *Hill I* at 45-46.

21/ *Id.* at 46-47.

22/ *Id.* at 47.

23/ Answer Br. of County in *Hill I* at 44-55.

manufacturing site inspections.[24/] The services identified in Hill's contract under Item C were duties that were never Hill's responsibility because they were never requested from Hill by the County as the contract required. Among the multiple and diverse duties which the County absorbed in taking on the Item C services for itself were the responsibilities to oversee and inspect the materials brought to the construction site and the work of the contractor for the installation of the pipe segments and other aspects of the system, on a daily basis. (V. 96 at 14225, 14231, 14235-36, 14256; V. 98 at 14617-19). At this stage of the project, and pursuant to its agreement with Interpace, the County repeatedly inspected the pipe segments manufacturing plant, and observed the processing of the aggregate used to

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24/ Initial brief in *Hill I* at 47-48. The County not only became the general contractor on this project, but it recast the contract which it signed with Interpace. It took a Hill-provided form contract designed for a contractor relationship and then signed it directly with Interpace. *Id.*; *see also* Reply Br. in *Hill I* at 12. The incentive for this procedure was that the County saved sales tax by purchasing the pipe directly, rather than through an installation contractor. Initial Br. in *Hill I* at 48. A number of the County's present alleged breaches are still grounded in its refusal to acknowledge its own "resident engineering" responsibilities arising from its contract with Interpace. As a prime example, the County contends that Hill was remiss in drafting portions of the manufacturer's contract with the County. This entirely ignores the discussion in *Hill I* briefing to the effect that the County itself modified the use of that "shelf" document by gerry-rigging a Hill form contract more appropriate for use by a construction contractor engaging a manufacturer for supply of pipe segments and component parts and materials. (Reply Br. in *Hill I* at 1, 12).

manufacture the cores and concrete coating of pipe segments. (V. 96 at 14229-259).[25]

Hill lastly pointed out that the miscellaneous, Item D services in its contract were, for the most part, never requested by the County.[26] Among those services not requested were materials testing services, including "laboratory testing" on the pipe segments and their components such as wire, mortar casings and coatings. (PR. 1946).[27]

The County's answer brief in *Hill I* was dominantly devoted to a defense of the County's merger and manufacturing oversight theories of contract breach.[28] As something of an addendum to its contract breach arguments, the County argued that Hill had effectively waived objections to many of the supposed contract breaches found in the final judgment by Hill's declining to rebut, point-by-point, the 200-page final judgment drafted by the County and approved without alteration by the trial judge.[29] The court did not expressly discuss the County's waiver theory in its *Hill I* opinion, but plainly it had to have rejected that theory in rendering its decision.

25/ These facts and their legal implications were fully briefed in *Hill I*. Initial Br. in *Hill I* at 7-9, 47, 55.

26/ Initial Br. in *Hill I* at 7, 55.

27/ *Id.* at 55.

28/ Answer Br. in *Hill I* at 15-26.

29/ *Id.* at 31.

c. The County's present allegations are traceable to issues rejected in the *Hill I* decision.

As a consequence of the *Hill I* decision, the County's contract with Hill must be considered independent and apart from the County's contract with Interpace. The County has reverted to a commingling of the two contracts, however, as if that issue had never come before the court and been rejected.

By charting some 42 matters that are alleged to constitute "contract" breaches, the County has merely served up to the court a restatement of its fallen negligence subparagraphs and its reattribution to Hill of contractual duties placed on Interpace, the manufacturer. A careful review of the County's contract with Hill, standing alone and freed from Interpace duties and tort assertions, when compared with the 42 items listed, reveals that the *Hill I* decision was correct in foreclosing on retrial all but class IV wire.

The County's chart commences with a three part acknowledgment of points it recognizes to be law of the case from *Hill I*:

(1) Hill has no responsibility for duties identified in the manufacturer's separate contract;

(2) Hill had no duty to inspect the pipe segment manufacturing process; but

(3) the class IV wire issue has been remanded for a determination of whether that design criteria constitutes a breach of Hill's contract.

Thereafter, the County's understanding of the breadth of *Hill I* and that of Hill diverge completely.

(4) - (6) Alleged breaches 4, 5 and 6 involve limitations in design concerning soil conditions for the pipeline. Hill's briefing established, without contradiction, that the County accepted Hill's Item A services (in Hill's contract) without dispute.[30/] Insofar as any "testing" obligations the County implies were imposed on Hill by virtue of Item A, that interpretation is fully belied by the exclusion of testing responsibilities in Item D(2), absent specific request by the County, which was never made. This fact was surely conceded by discussion in Hill's briefs and conspicuous silence in the County's answer brief in *Hill I*.

(7) Alleged breach 7 concerns failure to design for wire ductility. The County's answer brief formerly asserted this to be a breach of accepted Item A services in the Hill contract and a breach of the Interpace contract.[31/] Neither premise remains a plausible basis to assert a contract breach after *Hill I*.

30/ Reply brief in *Hill I* at 1.

31/ Answer brief in *Hill I* at 4, 6.

(8) Alleged breach 8 asserts inadequacy in design of safety factors for the pipeline and pipe segments. But the parties addressed with particularity the issues of pressure rating of the pipeline and the absence of an in-service break under normal operating conditions in the first appeal.[32/] The County's allegations of a breach in design safety continue to be wildly speculative. Apart from this, the County previously presented this aspect of the case as another form of manufacturer's contract breach by Hill,[33/] which cannot survive the rule of non-merger identified in the *Hill I* decision.

(9) Alleged breach 9 involves failure to review design calculations for individual pipe segments. This can plausibly relate only to the question of design pressure, which was fully briefed in *Hill I* and demonstrated to be without substance.[34/]

(10) Alleged breach 10 concerns Hill's allowing the manufacturer to specify ASTM A-648-73, which the County claims was unrecognized by AWWA C-301-72. To the extent this issue relates to design criteria for the approved use of Class IV wire, the issue was previously briefed, but remains available

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32/ Initial Br. in *Hill I* at 60-61; County's Answer Br. at 27; Reply Br. at 18.

33/ Answer Br. in *Hill I* at 30.

34/ See footnote number 28.

for retrial. The allegation has no meaningful content, in any event, but consists of mere camouflage to the wire specifications issue. Obviously, a standard finalized in 1972 (AWWA C-301) could not reference a standard issued in 1973 (ASTM A-648). But, Hill explained that ASTM A-648-73 was a more specific successor to ASTM A-227, which for the first time was limited to wire wrapping for pre-stressed concrete pipe segments.[35] The AWWA committee drafters later revised the AWWA standard to incorporate the new ASTM standard. It was hardly surprising that the manufacturer's submittals included this standard and that Hill found it to be unremarkable. This is a nonsense, non-issue of terminology without substance.

(11) Alleged breach 11 involves Hill's approval of 17 rather than 16 gauge cylinder steel. This issue was briefed by the County as a Hill breach under Item A of its contract in *Hill I*, an avenue of liability now removed from the case.[36] Moreover, the County's own manufacturing oversight and resident engineering responsibilities in the manufacturing and installation phases of the project provided its opportunity to question this feature, and foreclosed Hill's responsibility for this pipe segment attribute.

35/ Reply Br. in *Hill I* at 16-17.

36/ County's Answer Br. in *Hill I* at 4, 6.

(12) Alleged breach 12 concerns Hill's specification of "only absolute minimum standards" for the pipe segments. AWWA C-301-72 was the standard of compliance of the day when Hill designed the project, and that standard was specifically incorporated in the specifications, as demonstrated in *Hill I* briefing.[37/] Whatever novel characterization the County now chooses to place on the standards, it no longer has an "independent tort" claim available to it.

(13) The County contends that Hill failed to review project documents submitted by the manufacturer to the County. This supposed function was a manufacturer's contract duty, not part of the Hill contract.[38/]

(14) The County urges breach in Hill's failure to perform inspection and testing of materials used in manufacture of the pipe segments. This "manufacturing oversight" duty was foreclosed by *Hill I*. The County again ignores that test results on materials used in the pipe segments were to be sent to the County if it asked for them, pursuant to the AWWA standard incorporated in the County's contract with Interpace. This inspection phase of the

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37/ In fact, the County's Answer Brief in *Hill I* at page 21 maintained that AWWA C-301-72 was "an integral part of the . . . specifications," which were part of the Interpace contract with the County.

38/ County's Answer Br. in *Hill I* at 8-9.

project was to be performed by the County, not Hill.

(15) Hill's breach is contended from its failure to determine admixtures used in the pipe segments. The County stubbornly refuses to acknowledge that this manufacturing oversight function was ruled out by the *Hill I* decision.

(16) Hill is alleged to have breached its contract by not knowing which admixtures were used and by failure to inspect their use. Of course, this manufacturing plant oversight duty was also foreclosed by the *Hill I* decision.

(17) Hill is said to have breached its contract by failing to require additional tests of pipe segment materials and the segments beyond the standards and specifications drafted. Plainly, this is also a repackaged manufacturing oversight duty, since there would be no reason to expand upon contract specifications without knowledge of manufacturing activities. That knowledge was to be gained by the County when it chose to become the responsible figure for manufacturing oversight, not by Hill.

(18) The County maintains that Hill breached its contract by failing to require that test results, affidavits or certifications of compliance be supplied. The allegation does not state to whom those results were to be supplied, but the briefing in *Hill I* established that test results were to be sent to the County

by virtue of the manufacturer's contract with the County which incorporated the AWWA standard requiring test reports to be submitted to the purchaser.[39] Hill had no manufacturing phase duties.

(19) It is claimed that Hill breached its contract by certifying completion of the project without receipt of a certification of compliance. While Item B(6) of Hill's contract called for a recommendation to the County as to final acceptance of the "construction" work, the briefing in *Hill I* established conclusively that the County acted as resident engineer with day-to-day surveillance of the installation of the pipe segments, and with inspections (and some testing) regarding the manufacturing of the pipe segments.[40] This alleged breach again ignores the realities of the County's superseding command function of the resident engineering stage, which it specifically excluded Hill from performing. The County's resident engineering responsibilities were fully briefed by Hill and before the court in *Hill I*.

(20) This alleged breach assets that Hill did not provide adequate "acceptance inspection procedures" to identify defective pipe. The County never requested this function, which was an Item C duty of the Hill contract performed by the County itself.

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[39] *See* AWWA C-301; §1.9.6. *See also* Initial Br. in *Hill I* at 5.

[40] *See, e.g.*, Initial Br. in *Hill I* at 7-9.

(21) It is claimed that Hill failed to inspect the work properly. This was a resident engineering task performed by the County, as well, and excluded by non-authorization of Hill. The County chose to perform this function on its own, and it cannot at this late date escape that election. Page 19 of the County's answer brief in *Hill I* stated

> "The [manufacturer's] contract required [it] 'to permit a representative of the County, and/or its Engineers . . . to inspect the work and progress, or any of the materials . . . .'"

Of course, insofar as this vaguely asserted breach implies manufacturing oversight duties of Hill, that argument has been removed as a matter of law by *Hill I*.

(22) It is asserted that Hill breached by failing to identify incorrect pipe loading and unloading techniques. The standards specified by Hill, of course, refer to the proper procedure. More importantly, it was not Hill, but the County which observed the pickup and delivery of the pipe segments on a daily basis with persons supposedly expert to the task. This on-the-site task was a resident engineering responsibility of the County, and excluded by lack of authorization for Hill to perform Item C of its contract.

(23) It is contended that Hill breached its contract by failing to require the manufacturer to provide samples and specimens of pipe manufactured materials as provided for in the standards and specifications. This alleged breach again points out the County's disinclination to obey the dictates of *Hill I*. As noted previously, the County's contract with the manufacturer allowed it to perform inspection functions which Hill was nowhere obligated to perform. If these called-for samples were not provided, then it was due to the County's affirmative lapse, not any obligation of Hill.

(24) Hill is alleged to have breached its contract by failing to examine and test pipe segment components. This function was excluded with particularity in Item B of Hill's contract, and not authorized as an elective service in Item D(2).[41/]

(25) With similarity to alleged breach number 20, Hill is alleged to have breached by failing to require the manufacturer to provide an affidavit of compliance.[42/] The County, of course, accepted the project without this certificate. It was a duty of the manufacturer to provide this certificate to the County, as specified in the manufacturer's contract with the County.

41/ For example, see the Initial Br. in *Hill I* at 6, 7, 47.

42/ *Id.* at 7.

(26) It is alleged that Hill breached its contract by failing to require proper repairs to pipe damaged during transportation or installation. The County was the resident engineer for the installation phase of the project, and it took on this duty within the scope of that phase. Hill could have performed this duty under Item C of its contract, but the County never authorized or paid it to do so.

(27) It is alleged that Hill breached its contract by failing to detect that the pipe coating was mortar rather than concrete. Hill had no manufacturing oversight responsibility and the County, in its performance of that task or its resident engineer responsibilities, could have detected this readily had it mattered. (Actually, the facts were that the manufacturer's submittal was clarified to call for mortar coating, rather than concrete. There was no mistake.)

(28) It is alleged that Hill failed to design the pipeline to work at pressures up to 150 psi. The parties fully briefed this issue in *Hill I*[43/] and the court must have recognized from its review of the contracts that Hill was to design the pipeline for operation at 100 psi. A safety factor was specified for pipe segments to operate at pressures up to 150 psi with a surge factor of 210 psi. This was briefed, argued and considered, and the court found no breach.

43/ Initial Br. in *Hill I* at 4, 18, 60-61; County's Answer Br. at 29-30.

(29) It is alleged that Hill committed a design breach by failing to include sufficient surge pressure margins and protections. As noted above, the surge pressure issue was fully briefed,[44/] no plausible basis for breach was found by the court in *Hill I*, and none of this was in the least surprising. All of the contracts were clear, and the County never demonstrated that a surge pressure under normal operating conditions exceeded that designed into the system.[45/] The County's postmortem assertions to the contrary are speculative.

(30) Hill is said to have breached its contract by failing to design surge protection facilities properly. There is no breach here, as noted above.

(31) It is alleged that Hill failed to consider and design for possible surges in the pipeline due to interacting pump stations. The surge pressure issue was discussed in detail in the *Hill I* briefing, including a discussion of how other components of the pipeline, such as meters, and other integrated parts were designed to operate below 150 psi.[46/] This speculative ground for breach was fully briefed and considered by the court in *Hill I*.

[44/] *Id.*

[45/] Initial Br. in *Hill I* at 9-12.

[46/] Initial Br. in *Hill I* at 60.

(32) It is alleged that Hill failed to forewarn that pump stations could cause damaging surges in the pipeline. There is no contract requirement to this effect, but of course the surge issue is based on the County's misconception of the required pressure rating, its failure to acknowledge that a proper surge factor was built into the system, and that there have never been any surges in normal operating conditions beyond that built-in surge factor during the 12 years plus that the pipeline has been in operation. All this was briefed and considered in *Hill I*.

(33) The County contends that the engineer failed to design or advise as to the need for surge monitoring instrumentation. The surge issue was fully briefed previously, as noted above. A separate surge analysis could have been offered as an additional Item D testing service under the Hill contract in order to analyze whether further monitoring instrumentation was necessary. The County never requested this service, and it performed all resident engineering tasks on its own.

(34) It is alleged that Hill breached its contract by failing to draft into the manufacturer's contract a requirement that it provide all test results performed under AWWA C-301-72. As previously noted, AWWA C-301-72 was a specification incorporated into the manufacturer's contract with the County. Its terms required that the purchaser obtain these test results from the

manufacturer. This requirement was, therefore, incorporated by reference in the manufacturer's contract with the County.

(35) It is asserted that Hill breached its contract by failing to require that the manufacturer present a certification of compliance as provided for by AWWA C-301-72. The County is wrong. That requirement is within the AWWA standard incorporated by reference in the manufacturer's contract with the County.[47/]

(36) It is asserted that Hill breached its contract by failing to provide a sufficient warranty of the manufacturer's work in its contract with the County. The *Hill I* briefing discussed at length that the County had a significant hand in reviewing and reformulating the "shelf" contract provided by Hill to the County, which was a working form usually intended for use by a general contractor for its agreement with the manufacturer.[48/] Obviously, the County attorney would have reviewed the contract and made any changes deemed appropriate when it modified this contract for its use and negotiated its concerns directly with the manufacturer.

47/ The County's Answer brief in *Hill I* (at page 21) acknowledged the incorporation of AWWA C-301-72 into the Interpace contract.

48/ The County acknowledged this by its silence on the point in the *Hill I* briefing.

(37) The County asserts that Hill breached its contract by failing to provide a "proper protection clause" for the County as recourse against the manufacturer for supply of a defective product. Once again, the County was obligated to draft and issue a contract that its lawyers deemed satisfactory under the circumstances. There was no breach by Hill.

(38) This allegation asserts that Hill breached its contract by failing to inform the County of the expected life of the pipeline. This obligation is nowhere encompassed in Hill's contract. Any "independent tort" claim has been foreclosed by *Hill I*.

(39) It is alleged that Hill failed to exercise due care in reviewing manufacturer's submittals for the project. The court has remanded this issue for retrial insofar as whether the submittals concerning wire wrapping were within the design criteria specified by Hill. In its *Hill I* briefing, Hill explained that there were 5 system-wide "manufacturing defects" which the County alleged to be in each and every pipe segment: (1) mortar coating that was too porous; (2) insufficient slurry encasing the wire wrapped around each pipe core; (3) improperly cured cement core; (4) improper materials (aggregates) used in core manufacture; and (5) defective wire used to wrap each pipe core.[49/] As noted in briefing then, Hill had

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[49/] Initial Br. in *Hill I* at 61.

no connection whatsoever to the first four of these alleged defects. It had no duty to oversee the manufacturing of the pipe segments or the manufacturing of their component parts. These oversight obligations were County duties and were not Hill's concern, as found in the *Hill I* decision. This court found that the wire wrapping issue was distinctive in that a fact question was raised as to whether Hill's design criteria improperly allowed the use of class IV wire. While in *Hill I* this issue was engulfed in the County's assertions of tort, merger and manufacturing oversight, the entire debate of whether the submittals met their design criteria was precisely before the court. The court rejected these other grounds for breach (other than as to wire) which were comprehended by the design specification and manufacturer's submittal process, by virtue of the parties' briefing in *Hill I*. Clearly, the other alleged pipeline-comprehensive defects were either manufacturing phase oversight responsibilities of the County or within its resident engineering tasks. The court has already laid this issue to rest.

(40) The County alleges that Hill allowed the manufacturer to manufacture "lesser quality pipe" than called for by specification. This was a manufacturing oversight responsibility of the County, not Hill. The issue has been foreclosed by *Hill I*.

(41) The County alleges that Hill failed to reject shop drawing submittals by the

manufacturer, including the ASTM A-648-73 specification for the manufacture of class IV wire. While Hill has already explained that the County's allegations of breach concerning approval of the ASTM A-648-73 standard is a non-issue, the issue forms part of the remand for re-trial as it pertains to the use of class IV wire.

(42) The County asserts that Hill failed to require the manufacturer to meet specifications of AWWA C-301-72 requiring the provision of wire and steel test specimens to the County. There is no Hill contract requirement calling for this. The manufacturer's contract, by incorporating the AWWA standard by reference, allowed for the County to receive these test specimens if requested by the County. Since that specification was within the manufacturer's contract, there was no Hill breach.

This exhaustive rebuttal to the 42 matters asserted by the County as contract breaches demonstrates that the County's view of what was unresolved by *Hill I* is unfounded. In the main, the County has merely reinvoked spurious claims that Hill was responsible for manufacturing oversight and resident engineering duties. Hill was not. Other alleged breaches are the product of speculation by the County, previously addressed and debunked by the issues extensively briefed and subsequently decided in *Hill I*.

d. The County's rehearing and clarification motion.

After the court issued its opinion in *Hill I*, the County massaged its intermingled theories of contract breach merger and oversight duties, but centrally urged the court to reconsider on the basis that Hill's contract was breached in myriad ways.[50/] The assertions there are the very assertions the County argues here.

The County's motion argued that it should be entitled on remand to try contract breaches other than with respect to class IV wire, despite the court's decision that all other contract claims are barred as a matter of law. The County's point could not have been more clear:

> In short, the panel's ruling that only one alleged breach -- Class IV wire -- is left in the County's contract claim against the Engineer overlooks numerous other breaches of the obligations the Engineer expressly assumed in its contract. *The panel's opinion should be*

50/ *See* County's rehearing and clarification motion in *Hill I* at pp. 9-12. The County's motion also took intensive issue with the court's disposition of the tort issues. *Id.* at 2-5.

clarified to make plain that the County may on re-trial pursue all of its claims of breaches of the Engineer's direct contract with the County.[51]

The court denied the County's motion. (PR. 163).

e. Law of the case requires affirmance of the trial court.

In Hill's initial brief and the documents that followed in *Hill I*, the court had before it an expansive explanation of the division of responsibilities between Hill and the County, based on the narrow set of contract duties assigned in the County's contract with Hill and actually undertaken by Hill. That division of responsibility *excluded* Hill from several permeating tasks -- manufacture and installation supervision, and testing, being foremost.

Under the doctrine of law of the case, the County has had its day in this court on the precise issues which are the subject of this appeal. The County's renewal of arguments previously made and rejected is improper. Reconsideration of a case "should never be allowed when it would amount to nothing more than a second appeal on a question determined in the first appeal." *Fischbach & Moore, Inc. v. McBro, a Division of McCarthy Bros. Co.*, 619 So. 2d 324 (Fla. 3d DCA 1993), citing to *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965).

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[51] *Id.* at page 12 (emphasis added).

A second appeal is all that the County is seeking. The scope of Items A through D in the Hill contract was thoroughly examined in the *Hill I* proceeding. The functions within those Items which Hill was specifically authorized to perform, and those which it was not authorized to perform, were either particularized in Hill's briefing or necessarily subsumed within its general discussion of contract terms and the County's responses in relation thereto. Additional responsibilities sought to be foisted on Hill by virtue of the merger of Interpace and Hill contracts, by assignment of manufacturing oversight duties, and by reference to duties arising from the County's role as resident engineer and contractor for the project, were rejected. Those are the very issues, re-appearing now in this appeal, that were decided by the court in *Hill I*.

The County admits that the proper test for "law of the case" preclusion encompasses not only issues raised and ruled on, but issues which are "implicit" in an appeal even if not expressly addressed in the appellate court's decision.[52/] The briefs of both parties determine what was raised and what was considered on appeal, of course. The range of raised, considered and implicitly determined issues goes well beyond the

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52/ County's Br. at 20. It is the traditionally-held view of the Florida courts that previous decisions of appellate courts which impliedly address or necessarily consider issues, even without particularizing them specifically, foreclose re-litigation of the substance of those issues. *See, e.g., Dade County Classroom Teachers' Ass'n, Inc. v. Rubin*, 238 So. 2d 284 (Fla. 1970), *cert. denied*, 400 U.S. 1009 (1971); *Sax Enterprises, Inc. v. David and Dash, Inc.*, 107 So. 2d 612 (Fla. 1958); *Alford v. Summerlin*, 423 So. 2d 482 (Fla. 1st DCA 1982).

County's narrow focus when the County's multiple arguments in *Hill I* are reevaluated. Indeed, a wider breadth is readily seen from just pages 3-4 of the County's answer brief in *Hill I*, which displayed for the court's consideration the complete panoply of issues which now appear in the chart on page 15 of its present brief.

In these regards, it is unnecessary that a legal point raised in the second appeal constitute a mirror image of that raised in the first appeal. Law of the case applies even to discourage visitation of points of law which *should have been* adjudicated in a former appeal, in order to lend stability and lack of fragmentation to the adjudicatory process. *Federal Deposit Ins. Corp. v. Hemmerle*, 592 So. 2d 1110, 1116 (Fla. 4th DCA 1991), *rev. denied*, 601 So. 2d 552 (Fla. 1992); *Valsecchi v. Proprietors Ins. Co.*, 502 So. 2d 1310 (Fla. 3d DCA 1987). Properly cast, all that the County has to commend its position to the court is a trenchant view that it deserves a second chance to present evidence of the same alleged range of issues it previously litigated. The County would treat the entire first appeal as being for nought -- a pyrrhic victory for Hill, and an exercise in futility for the court.

The cases cited by the County in an effort to elude "law of the case" are ineffective supports for its position. Each reflects the typical situation of a trial court's refusing to address issues on remand which were never disposed of by a first appeal.[53/] Indeed, the

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53/ See the cases collected at page 20 of the County's initial brief.

leading case identified by the County constitutes a classic *misapplication* of the doctrine by a trial court.

Two M Dev. Corp. v. Mikos, 578 So. 2d 829 (Fla. 2d DCA 1991), involved challenge to a property tax assessment on two alternative grounds: assessment of the property as substantially completed; or if it were properly assessed then statutory factors of assessment were not considered. The trial court had initially ruled that improvements to the property were not substantially completed, so that the assessor had overvalued the property. On a first appeal the district court reversed that determination. *Mikos v. Two M Dev. Corp.*, 546 So. 2d 1110 (Fla. 2d DCA 1989). On remand, the trial court refused to consider the alternative position of the property owner, to the effect that the statutory factors were ignored by the tax assessor. The district court reversed that restricted view of the "law of the case" in the second appeal. It was held that the court had neither explicitly nor implicitly considered the statutory factors issue, for it had never been determined by the lower court in the first instance. 578 So. 2d at 831. The court expressly noted that the statutory factors issue was made moot by the trial court's first ruling, so that neither the trial court nor the first appellate panel had ever considered that issue, even on rehearing in the first appeal. *Id.*

The County points to no fact or law made moot by the first trial or its oversized final judgment. Proof positive that all issues framed in this appeal were decided against the County in *Hill I* is the County's rehearing and clarification request, which expressly raised in the first appeal all conceivable points now represented.

f. There can be no "due process" or "access to court" denial in rejecting the County's claims.

The County argues in part that its constitutional right to due process, and its access to the courts, will be denied unless it can open up for retrial the multitude of matters which the court in *Hill I* foreclosed. The argument is emotional nonsense. No process or access rights have been impaired if the County had a trial and an appeal (which it did), and if the appellate court considered and rejected its contentions as legally improper (as it did). Access was fully availed of,[54/] process was amply provided,[55/] and the County simply did not prevail. The constitution does not guarantee a "win" to Pinellas County.[56/]

54/ The County had a year-long "day in court" on the issues it framed for trial.

55/ The appellate process was more than ample, given the expanded briefing rights, massive appendices provided, and the lengthened oral argument times.

56/ There is no lack of justice or process in denying the County a belated opportunity to replace its claims of tort breach with a new "contract" name. The County cannot have it both ways: first cloak all manner of breaches within two theories which lack factual and legal veracity, and then when unmasked cry "constitutional violation" in order to reintroduce them with a new *nom de plume*. *Compare Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561 (Fla. 1988).

3. The County is in reality seeking a belated rehearing of the *Hill I* decision

The issue before the court in this appeal is really not whether the trial court followed this court's opinion and mandate, for clearly and unmistakably it did. Nor is the issue whether the court meant what it said in *Hill I*. Cutting to the core of the County's contentions, the issue here is whether the court should reconsider what it did in *Hill I*, for *that* is the undeniable challenge, unstated here, which the County has proposed.

The County made unmistakably clear to the trial court its dissatisfaction with the court's *Hill I* decision. It asserted, arrogantly, that the court's opinion and mandate could not possibly mean what they expressly said in light of the County's own knowledge of the evidence, and that the *Hill I* decision is "preposterous" if it has foreclosed issues other than the use of class IV wire.

> Frankly, it's a preposterous Opinion, it absolutely flies in the face of everything that we know about construction documentation, but that's what they have done.

(PR. 249-298; transcript of proceedings on Request for Clarification at p. 17).

Hill does not believe that the court's *Hill I* decision is preposterous, nor is it at odds with the *Hill* contract documentation on which the County must now travel. Given the record before the court when *Hill I*

was decided, the court's decision was rock solid, and eminently correct.

The County has presented the court with a completely improper, and jurisprudentially mischievous third attempt to find theories of liability against Hill.[57] That is, the County is simply asking the court to revisit and reverse the decision which was made initially on March 13, 1992, and then reaffirmed after reconsideration on May 19 of that year. The County's appeal is nothing more than an untimely re-rehearing of matters the court has already fully considered and rejected. As such, the County's position should be summarily dispatched. *Whipple v. State*, 431 So. 2d 1011 (Fla. 2d DCA 1983). *See also Parker v. Baker*, 499 So. 2d 843 (Fla. 2d DCA 1986), *rev. denied*, 506 So. 2d 1040 (Fla. 1987); *Jackson v. U.S. Aviation Underwriters, Inc.*, 466 So. 2d 1119 (Fla. 2d DCA), *dism'd*, 472 So. 2d 1181 (Fla. 1985).

In *Hill I*, the court both exhibited and acknowledged its careful analysis of the record on appeal in two significant respects. First, the court identified and quoted specific counts in the County's amended complaint: the one grounded in negligence and the other grounded in breach of contract.[58] In the course of performing its review function, the court also scrutinized the County's contract with Hill:

57/ The County pursued these theories both on the initial appeal and again in its motion for rehearing and for clarification.

58/ *Hill I*, 598 So. 2d at 88.

> Our reading of the Hill Contract, a function wholly within our scope of review, [citation omitted], has led us to the opposite conclusion [i.e., that Hill had no contract responsibility to oversee the manufacturer of pipeline segments].

Hill I, 598 So. 2d at 88-89.

The significance here is not that the court in fact read the relevant portions of the record, for that would always be the case. Rather, the significance for this appeal inheres in the fact that the court specifically addressed the relationship between the contract provisions which were alleged to be breached and the allegations of the County's complaint -- the County's so-called "construction documentation." The specificity of that comparative review is precisely why the County is wrong in decrying the *Hill I* decision as preposterous, and asserting that the court could not possibly have meant what it said.

Hill respectfully suggests that the court said precisely what it meant, and that the record on appeal and the arguments of the parties fully support the court's decisional recitation.

Conclusion

The determination of the trial court to allow retrial only on the class IV wire issue, in complete compliance with this court's *Hill I* decision and mandate, should be affirmed.

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